In The

Supreme Court of the United States

October Term, 1975

No. 75-1598

GLOBAL MARINE DEVELOPMENT OF CALIFORNIA, INC.,

Petitioner

vs.

DISTRICT 1 — PACIFIC COAST DISTRICT, MEBA, AFL-CIO,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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vs.

NATIONAL LABOR RELATIONS BOARD
AND
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Global Marine Development of California Inc. respectfully prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit entered in this cause on December 5, 1975.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Ninth Circuit was rendered on December 5, 1975, enforcing an Order entered by the National Labor Relations Board theretofore issued against this Petitioner. The Decision and Order of the National Labor Relations Board[1] is reported at 214 NLRB No. 40 (1974) and

[1]The Decision and Order of the National Labor Relations Board which is in issue in this case did not present any analysis of the evidence in the record, but rather merely approved the Findings of Fact and Conclusions of Law of the Administrative Trial Judge and adopted

is reproduced as Appendix A (pp. A-1-A-30, infra). The Opinion of the Court of Appeals is reported at 528 F. 2d 92 (9th Cir. 1975) and is reproduced as Appendix B (pp. B-1-B-5).

JURISDICTION

The Opinion and the Judgment of the Court of Appeals was entered on December 5, 1975. Petitioner timely filed a Petition for Rehearing and Suggestion of Rehearing En-Banc and on February 4, 1976, the Court of Appeals entered its Order denying said Petition. The jurisdiction of the Court of Appeals was invoked under Section 10 (f) of the National Labor Relations Act, as amended (29 U. S. C. Section 160(f)). The jurisdiction of this Court to review the Judgment of the Court of Appeals below is invoked under 28 U. S. C. Section 1254 (1).

QUESTIONS PRESENTED

I.

Whether licensed marine engineer officers serving aboard a United States flag vessel on the high seas as watch standing ship's officers are "supervisors" as defined in Section 2(11) of the National Labor Relations Act, as amended (29 U. S. C. Section 152, (11)) as a matter of law, by virtue of the duties, powers and authority conferred and imposed upon them by the maritime laws of the United States of America.

II.

Whether the National Labor Relations Board and the Court of Appeals are obligated to consider and give effect to federal shipping laws and policies when those laws and policies bear

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that Judge's recommended Order. Therefore, when Petitioner hereinafter mentions the Findings or Conclusions of the Board, it will in fact be referring to the Findings and Conclusions of the Administrative Law Judge which were effectively adopted as those of the Board. The Findings and Conclusions and recommended Order of the Administrative Law Judge are reproduced as part of Appendix A to this Petition.

directly on the status of marine officers as supervisors under the National Labor Relations Act.

III.

Whether the Court of Appeals misapplied the substantial evidence rule in failing and refusing to consider the uncontradicted admissions of the engineer officers involved in this case that they possessed and exercised supervisory authority and powers.

IV.

Whether the record as a whole establishes as a matter of law and fact that the engineer officers involved herein, or any of them, are supervisors as defined in the National Labor Relations Act.

V.

Whether licensed marine engineer officers are, as a matter of law, professional employees as defined in Section 2(12) of the National Labor Relations Act, as amended (29 U. S. C., Section 152(12)), and under the decisions of the National Labor Relations Board.

VI.

Whether the employees classified as oilers on the *Hughes Glomar Explorer* were denied their rights under the National Labor Relations Act by having union representation imposed on them by virtue of a bargaining order when they never indicated any desire for such representation and were unrepresented and did not participate in any way in any of the proceedings below.

VII.

Whether the authorization cards relied on by the Union and the National Labor Relations Board, or any of them, as a matter of law, were obtained by improper supervisory influence, coercion

and solicitation or were otherwise tainted by improper supervisory influence.

VIII.

Whether the National Labor Relations Board and the Court of Appeals gave controlling and decisive weight to the fact that Petitioner did not produce witnesses of its own, thus misapplying the statutory burden of proof, and denying Petitioner its rights to due process and equal protection under the Constitution of the United States, the National Labor Relations Board Rules and Regulations, and provisions of the Administrative Procedure Act; in the alternative whether this case should be remanded for further proceedings based on the fact that national security considerations necessitating secrecy restraints at the time of trial and appeal denied Petitioner the opportunity to fully develop its case.

FEDERAL STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, (29 U. S. C. Section 151 et seq.) and United States Shipping Statutes, as amended, (49 U. S. C. Section 1 et seq.) are reproduced as Exhibit C to this Petition (Pages C1-C5, infra).

STATEMENT OF THE CASE

Before proceeding with a presentation of the relevant facts in this case as established by the record, Petitioner would present additional facts which it believes are pertinent to this case and which it believes will assist this Court in its consideration of this Petition. The record in this case establishes that the ship in question, the *Hughes Glomar Explorer,* was designed and built as an experimental vessel suitable for undersea mining and other purposes. Subsequent to the trial of this case before the National Labor Relations Board it was publicly revealed that the vessel in question was in fact owned by the United States government and was designed and built to carry out certain operations of a classi-

fied and highly secret nature. The government's ownership of this vessel and general facts as to its purpose were revealed in the course of litigation in the case of *United States of America vs. County of Los Angeles, California, et al,* being Civil Action No. 75-2752-R in the United States District Court for the Central District of California. These facts, including government ownership and involvement, could not be revealed by the Petitioner during the litigation of the instant case below because it was bound by government security requirements. Because of governmental security classifications and governmental restrictions imposed on Petitioner a number of defenses which normally could have been raised by the Petitioner at the outset of this litigation were denied to it. Also, as the record reveals, during the proceedings before the Administrative Law Judge of the National Labor Relations Board (hereafter called the "Board"), Petitioner rested its case without producing a single witness. Petitioner asks that the Court keep these facts in mind when considering the facts that were established by the evidence below.

A. *Facts*

Petitioner is a California corporation which, during the time herein in question, was engaged in the operation of a ship named the *Hughes Glomar Explorer.* Petitioner and affiliated companies also are engaged in offshore oil and gas drilling operations worldwide and have some fourteen other vessels. The ten individuals involved in this case were all formerly employed by Petitioner as marine engineer officers aboard the *Hughes Glomar Explorer* and it was the termination of their employment that resulted in this case.

In considering the following presentation of facts, Petitioner would point out to the Court that the general organization of the crew of the *Hughes Glomar Explorer* is in some ways unusual. First, the ship has two separate crews — complete from the Captain down. These crews, designated as the "A" and "B" crews, serve alternately with one crew manning the ship and the other on

leave. Like other ships the *Hughes Glomar Explorer's* crews have a deck department made up of licensed deck officers (Captain, First, Second and Third Mates) and seamen, and an engineering department made up of engineer officers (Chief, First, Second and Third Engineers) and seamen. The vessel's crew also contains a steward's department, and, unique on a seagoing vessel, a mining department. All of the other vessels of Petitioner's affiliates are similarly organized, except that they carry a drilling rather than a mining crew.

During the proceedings below, the parties stipulated to the supervisory status of certain personnel aboard the ship. First, the Captains, First Mates, Mining Superintendents, Assistant Superintendents of Operations, Mining Foremen, Chief Stewards and Chief Engineers were stipulated to be supervisors as defined in the National Labor Relations Act. Also, the parties stipulated that Petitioner considered the Second and Third Mates and Bosuns in the deck department to be supervisors as well. This latter stipulation is significant because the record reveals that the engineer officers in question considered their positions in the engineering department to be equivalent to those of the second and third mates in the deck department.

The events which culminated in this case began while the *Hughes Glomar Explorer* was under construction at Chester, Pennsylvania. Several of the engineer officers joined the ship during the final stages of construction for the purposes of overseeing final construction and to familiarize themselves with the ship and its equipment. In July, 1973, the ship left Chester, Pennsylvania, and sailed to Long Beach, California, stopping once in Bermuda after sixteen days sailing where the B Crew relieved the A Crew. The B Crew completed the fifty day voyage around South America to Long Beach, California, arriving there on October 1, 1973. The voyage to California served a dual purpose; first, to get the ship to California, and, second, as a shakedown cruise. The shakedown cruise is common to all new ships and serves to allow the

crew to become familiar with the vessel and to find and correct construction defects and similar problems, of which there were a great many on board this ship.

At various times during the construction period the engineer officers already working aboard the ship, including the Chief Engineers, met among themselves and with a business agent and organizer for the Union. In addition to the engineer officers in question in this case, the Chief Engineers, stipulated to be supervisors, also attended many of these meetings and openly supported the Union's organization activities, going so far as to sign authorization cards.

Petitioner became aware of the union activities of its officers and on several occasions, meetings were held among the officers and various of Petitioner's senior management personnel. At these meetings, Petitioner warned the engineer officers that they were supervisors and part of management, and that Petitioner was declining to bargain with the Union seeking to represent them. Petitioner also discussed grievances which were presented by these officers and promised to try and correct problems. During these meetings, the Chief Engineers openly opposed the Petitioner and supported the Union. Finally when the engineer officers, despite Petitioner's warnings, refused to refrain from activities in support of the Union, their employment was terminated. Upon discharge the unfair labor practices resulting in this case were filed.

The engineering department of the *Hughes Glomar Explorer,* which is at the heart of this case, consisted during most of the time in question of the engineer officers and subordinate employees classified as oilers. The officer complement of each crew consisted of one chief engineer, one first engineer officer, one second engineer officer, and three third engineer officers.

When the ship was nearly complete and was preparing for sea, the personnel in the engineering department were organized

into formal watches. Also, at this time, areas of duty and responsibility outside basic watch standing duties were assigned to the various officers. Each of the first, second and third officers was assigned to consecutive control room and maintenance watches of twelve hours each day. Also, one oiler was assigned to each control room watch to serve under the engineer officer in charge. At first, some of the third engineer officers served on watch in oilers positions for the reason that they were newly licensed and were without the experience necessary to take charge of a watch. As these third engineer officers became familiar with the ship and gained experience, they were assigned to and stood regular watches without supervision, such reassignment taking place within two or three weeks of joining the ship. The Chief Engineer Officer did not stand watch as such but was on call at all times and otherwise set his own schedule.

The engineer officer on watch in the ship's control room is in absolute charge of the engine room and engineering department, and every person, whether officer or seaman, entering the engine room is under his direct command and control. The control room of the *Hughes Glomar Explorer* is the heart of the engineering department and its design and functions represent a high degree of automation which allows a very small engine room staff. The control room itself measures approximately twenty-five feet by seven feet. Running almost the entire length of the room is a massive panel from which the ship's engines, generators and other power units are controlled and monitored. Glass windows allow the control room watch officer to view most of the engine room.

The primary duty of the control room watch officer is to keep a constant watch on various gauges and other indicators which reflect the performance of the ship's engines and other power units which he controls. The other basic aspect of that officer's duty is to actually control the ship's power. At his fingertips are the controls for virtually the entire ship's power. Whatever is

required, whether it be a change in the ship's speed, more or less power for lighting, heating, cooking, cooling, mining or virtually any other power adjustment, it is the control room watch officer who receives and interprets those requirements and makes the necessary power adjustments.

The watch officer in the control room is also there to detect any problem or defect in the ship's mechanical equipment and to take any corrective action when necessary. This is a vital function for obvious reasons, since detection allows early correction and prevents more severe problems and dangers to the ship itself. The control room watch officer is not allowed to leave the control room for any reason unless relieved by another licensed engineer officer. Therefore, should this officer detect a malfunction and not be able to correct it from the control panel, he directs the oiler assigned to him to make a physical inspection of the equipment involved and, based on the oiler's report, determines the necessary corrective action. If it can be corrected from the control room, he does so. Otherwise, he will summon the engineer officer on maintenance watch and have him check the problem, and, if possible, take corrective action. (The maintenance watch is on duty at the same time, works throughout the engineroom and comes under the general supervision of the control room watch officer.) In very serious situations the control room officer may also summon the Chief Engineer or another higher officer. Further, should the control room watch officer deem it necessary he can, at his own discretion, shut down the engine or other machinery which is giving trouble.

As noted above, the control room watch officer is not allowed to leave the control room unless properly relieved and, therefore, an oiler is assigned to each control room watch. In addition to correcting the malfunctions as directed by his superior officer, the oiler performs such other duties as directed by the watch officer, including making periodic physical examinations of the equipment outside the control room. The control room watch officer

keeps a detailed log of all actions, conditions and orders given and this log is reviewed each day by the chief engineer and the first engineer.

Each engineer officer also serves in charge of a maintenance watch. Assigned to that officer is an oiler who is under the officer's direction and control. The duties of the maintenance watch officer include normal periodic inspection of the ship's machinery and other equipment, routine maintenance and upkeep, and correction of such defects that may be detected by the control room watch officer and the carrying out of any special orders from the chief engineer or the first engineer. Also, the maintenance watch officer performs such other duties as he deems necessary and appropriate during his tour of duty, and directs the oiler assigned to him to perform such duties as in his judgment may be necessary.

The oilers in the engine department are at all times and in all regards subordinate to the engineer officer in charge of their watch. The oilers perform such manual duties as are assigned by the officers, especially the officer in charge of the particular watch to which the oiler is assigned. There is no dispute that the oilers aboard the *Hughes Glomar Explorer* are employees as defined in the National Labor Relations Act. Both in fact and in law the oilers have no powers of supervision or command whatsoever.

B. *Proceedings Below*

As previously mentioned, when Petitioner became aware of the union organizational activities of its engineer officers, efforts were made to dissuade those officers from further union activities. When these efforts failed, the company discharged all of the engineer officers then employed aboard the *Hughes Glomar Explorer,* including the Chief Engineers on both crews. The Union, on behalf of the officers, promptly filed unfair labor practice charges with the National Labor Relations Board. The charges filed covered not only the first, second and third engineer officers, who are involved in this case, but also the two Chief Engineer Officers. The Union subsequently amended its

Complaint, dropping the Chief Engineer Officers, and the General Counsel issued an unfair labor practice complaint based on that charge. One unusual feature of the complaint was the fact that, even though the Union sought a bargaining unit composed solely of the engineer officers and had never sought to represent anyone other than those officers, the General Counsel demanded a bargaining order covering not only the officers, but also the oilers employed on the ship.

The case was tried before an Administrative Law Judge of the Board, and on June 13, 1974, that Judge issued his Decision and Proposed Order (A. 3-30). The Administrative Law Judge found that all ten of the engineer officers were employees as defined in the National Labor Relations Act, were not supervisors, and that Petitioner had committed the unfair labor practices as alleged. The Administrative Law Judge also found that the appropriate bargaining unit consisted of both officers and oilers and recommended a bargaining order covering all of those personnel. There are two important facts which must be remembered concerning the Decision and Recommended Order of the Administrative Law Judge. First, the Administrative Law Judge did not consider the engineer officers individually by their respective positions in the ship's organization. He did nothing but simply generalize about the officers as a group and seemingly relied solely on the *direct* testimony of these officers, ignoring the undisputed and uncontradicted admissions of supervisory powers elicited from the witnesses on cross examination. Secondly, he simply dismissed the entire issue of the relationship of the maritime laws to the issues in question without any real consideration of this vital relationship.

Petitioner filed timely Exceptions to the Decision and Recommended Order and on October 22, 1974, the Board, without opinion or comment on the issues, rendered its Decision and Order (A 1-2) adopting the Administrative Law Judge's Decision and Proposed Order *in toto.*

Petitioner declined to comply with the Board's Order and timely filed a Petition for Review with the U. S. Court of Appeals for the Ninth Circuit pursuant to Section 10(f) of the National Labor Relations Act, as amended, (29 U. S. C. Section 160(f)). The Board filed a Cross-Petition for Enforcement and the Union intervened in the proceedings. On December 5, 1975, the Court of Appeals issued its Decision enforcing the Order of the Board. In its Opinion (B 1-5) the Court of Appeals did little more than state that there was substantial evidence to support the Board's Decision. The Court of Appeals gave no consideration to the maritime laws issue in the case and no mention whatsoever was made as to that issue in the Court's Opinion. Further, just as the Board failed to do, the Court of Appeals gave no consideration or analysis to the evidence related to individuals and considered the ten engineer officers as a single, homogeneous group, without distinction in position, power or duties.

REASONS FOR GRANTING THE WRIT

This case presents vital questions going to the proper balance between federal maritime law and policy on one hand and federal labor law and policy on the other hand that have never been considered by this Court. Indeed, as best Petitioner can determine, it has been over thirty years since this Court has considered *any* case involving the direct relationship between maritime law and labor law. This case also presents an example of the most glaring kind of misapplication of the substantial evidence standards of review enunciated by this Court in *Universal Camera Corp. v.* NLRB, 340 U. S. 474 (1951). Moreover, the Court of Appeals failed to follow its own decision in *Arizona Public Service Company v. NLRB,* 453 F. 2d 228 (9th Cir. 1971). Finally, the decision of the National Labor Relations Board reveals blatant disregard by that Board of the dictates of federal labor law, an action that obliterates the very employee rights that the Board is obligated to protect.

A. *This Court Should Decide Whether Actively Serving Marine Engineer Officers are Supervisors by Virtue of their Status under Federal Maritime Law.*

One of the key issues in this case involves the relationship of the authority and powers of command conferred and imposed on a ship's officers by federal law to the definition of the term supervisor as contained in Section 2(11) of the National Labor Relations Act, 29 (U. S. C. Section 152(11)). Simply stated, it is Petitioner's position that federal maritime law establishes a para-military command relationship between a ship's officers and non-officer crewmen which makes those officers supervisors in the truest sense of the word. Petitioner submits that it is undisputed in law and in fact that federal law gives a ship's officers powers of command, supervision and discipline over subordinates far beyond those possessed by supervisors in any other industry.

The legal relationship between a ship's officers and subordinate crewmen was discussed at some length by this court in *Southern Steamship Co. v. NLRB,* 316 U. S. 31 (1942). In that case this Court recognized that the relationship between seamen and ship's officers is entirely different than that of an employer to an employee on land. This Court went to great length in expressing the fact that the cornerstone of the relationship on board ship is *discipline,* and that a seaman once signed on as part of a ship's crew *is bound to obey the lawful commands of the ship's officers.* Throughout all maritime history and all over the world the condition feared above all others aboard ship is a breakdown in discipline and disobedience to a ship's officers. Disobedience is more dreaded even than fire at sea, because problems can be handled if there is discipline and obedience. But if discipline and obedience are absent, even the most minor problem can quickly become an overwhelming disaster. More recently, the Court of Appeals for the Ninth Circuit recognized the same principle in *Hudson Waterways Corporation v. Schneider,* 365 F. 2d 1012 at 1014 (9th Cir. 1966), wherein that Court stated:

> "One factor contributing to this peculiar status of the seaman is that he is obliged to obey whatever order he is given, under pain of severe penalties. * * * *He must obey the lawful orders of the master and of his superior officers....*" (Emphasis added)

See also, *Peninsular & Occidental SS Co. v. NLRB,* 98 F. 2d 411 (5th Cir. 1938); *Rees v. U. S.,* 95 F. 2d 784 (5th Cir. 1938); 46 U. S. C. Section 672(g); 46 U.S.C. Section 701 (FOURTH) and (FIFTH).

The cases cited above are based on the central theme that the safety of a ship at sea requires strict discipline and that such discipline requires obedience to the orders of a ship's officers. As best Petitioner can determine, it has been over 30 years since this Court has instructed the National Labor Relations Board as to this overriding dictate of federal maritime law. In *Southern Steamship Co. v. NLRB,* supra, this Court ruled that maritime discipline and the requirement of obedience to a ship's officers was of such importance in federal law that it displaced even the right to strike which is protected by the National Labor Relations Act. The importance that the Congress has always attached to the requirements of maritime discipline and a ship's officers' supervisory authority is perhaps best seen in the provisions of 46 U. S. C. Section 701 (FOURTH), which provides that any seaman who wilfully disobeys any lawful command given to him while at sea may be placed in irons and may ultimately be punished by imprisonment. Petitioner can only ask in what other industry can an employee be placed in irons, on bread and water, be fined, or suffer imprisonment for refusing to obey a lawful order given by a superior officer? What higher and stronger evidence of supervisory authority could possibly exist?

Concepts of discipline and obedience in the merchant marine cannot be realistically related to those in any civilian industry on land. The most realistic comparison that can be made is with the concepts and requirements of military and naval discipline.

Perhaps the para-military nature of disciplinary relationships in the merchant marine is shown best by the fact that, just as in the military, the most basic distinction aboard a ship is between the officers, who are in command, and the other ship's personnel, who are always the subordinates. This Court has had a number of opportunities to review the need for discipline in the military, and the importance of discipline perhaps was best expressed in this Court's opinion in *Parker v. Levy,* 417 U.S. 733 (1974), where it was stated:

> "While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline may render permissable within the military that which would be constitutionally impermissible outside it." (id. at 758)

In the *Levy* decision this Court also quoted with approval the following language of the United States Court of Military Appeals in *United States v. Priest,* 21 U. S. C. M. A. 564, 45 C. M. R. 338, (1972)

> "In the armed forces some restrictions exist for reasons that have no counterparts in the civilian community. * * * The armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself."

See also *Greer v. Spock,* ..... U.S. ....., 96 S. Ct. 1211 (1976) ..... L. Ed. ..... Maritime discipline exists for the same reasons as military discipline, that being the exceptional hazards of the sea faced by every ship, whether a tramp freighter or a giant ocean liner such as the *Andrea Doria,* and the men who sail them. Instead of giving consideration to such factors, the Board and the Court of Appeals treated this case more like one involving a factory or warehouse.

Despite the obvious importance attached by this Court and by the Congress to maritime discipline and the power of a ship's

officers, the National Labor Relations Board failed to deal with this issue, and simply glossed over it, saying, in effect, that it was not going to *consider* maritime laws, but rather would decide the issue of the supervisory status of the engineer officers in question based only on "normal" industrial standards. The Court of Appeals did not recognize or consider this vital issue and, indeed, did not even mention it in its Opinion. This failure by both the Court of Appeals and the Board is in direct conflict with this Court's admonition laid down in *Southern Steamship Co. v. NLRB,* supra, wherein this Court stated:

> "It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so singlemindedly that it may wholly ignore other and equally important Congessional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis on its immediate task." (316 U. S. at 47)

In the present case Petitioner has recognized the existence of the legal supervisory powers conferred by maritime law, the engineer officers in question in this case recognized them and testified as to their existence and importance, the General Counsel of the National Labor Relations Board and the Union never disputed them, and yet the Court of Appeals and the National Labor Relations Board chose to ignore the issue entirely. Petitioner submits that this Court should grant a Writ of Certiorari in this case because of the vital importance of this question to the entire maritime industry, and because such an issue should not be allowed to go without proper judicial consideration in a case of this nature. On a more limited basis, but nevertheless still involved, is the vital importance of these issues and this case to the offshore drilling industry, particularly in these times of continuing and growing petroleum shortages.

The importance of the issue of maritime laws in this case is highlighted by the Decision of the Board as affirmed by the Court

of Appeals whereby a bargaining unit was created consisting of both officers and oilers. In creating that unit, the Board, with the approval of the Court of Appeals, has struck a severe blow at maritime discipline by saying, in effect, that no distinction exists between officers and men; that no real organized chain of command exists and that none can exist aboard this ship. If this Decision is allowed to stand, Petitioner will be faced with the situation aboard ship that when an officer gives an order to an oiler, the oiler can simply thumb his nose at the officer, because by administrative and judicial fiat, they are equals under the law and the officer can not give an order and expect obedience. This is the effect of the Decision as it now stands and, unless reversed by this Court, any realistic concept of maritime discipline will be submerged and replaced by the preference of the National Labor Relations Board for union organization. Congress did not intend this result, either in the enactment of federal maritime statutes or the National Labor Relations Act.

B. *The evidence establishes that the Marine Engineer Officers are Supervisors as a Matter of Law.*

Petitioner realizes that it is unusual for this Court to review a case on the basis of the fact issues involved. Petitioner does submit, however, that this is an unusual case and that this Court should review the facts as to the supervisory status of the engineer officers in question in order to prevent a grave injustice to this Petitioner and also to protect the integrity of judicial review of decisions and orders of the National Labor Relations Board. In this regard Petitioner submits that if the Court will review the evidence in this case it can come to no other conclusion but that the Board's Decision and Order are not supported by substantial evidence on the record as a whole and that the Court of Appeals failed to carry out its function of proper judicial review.

One of the most glaring failures and errors of both the Court of Appeals and the Board is the failure of each to consider the

evidence of supervisory status of the ten engineer officers as individuals or by their respective classifications as first, second or third engineer officers. Consider, for example, the evidence related to First Engineer Officer, John Smith. He himself testified that while he stood a maintenance watch, oilers reported to him for their assignments. He further testified that he assigned watch standing duties of other engineer officers and assigned oilers to various watches and work periods. Smith further testified that he personally and effectively recommended the discharge of an engineer officer and that he was responsible for the training and familiarization work of the inexperienced third engineer officers, and he alone determined when they were qualified to stand watch without supervision. Similar testimony exists as to the other First Engineer Officer aboard the ship, Robert McDonald. In addition all of the other engineer officers testified conclusively as to their own possession and exercise of many of the elements of supervisory authority which are specified in Section 2(11) of the National Labor Relations Act.

Instead of considering all of this evidence, both the Board and the Court of Appeals lumped all of the officers together and used vague generalities to sustain the findings that these officers were not supervisors. Instead of considering direct evidence of supervisory powers possessed and exercised by these officers, the Board, with the rubber stamp approval of the Court of Appeals, simply dismissed all duties and functions of every officer other than the Chief Engineer Officer as being nothing but routine. The Board even went so far in its Decision as to dismiss all evidence that these officers actually possessed supervisory powers by saying that they never exercised them. This latter action is in direct controvention of a long line of cases which establishes that it is the *possession* of any one of the powers specified in Section 2(11) rather than the actual *exercise* of that power that makes an individual a supervisor. See, e.g., *Arizona Public Service Company v. NLRB,* 453 F. 2d 228 (9th Cir. 1971); *NLRB v. Metropolitan Life Insurance Co.,* 405 F. 2d 1169 (2nd Cir. 1968); *West Penn Power Co. v. NLRB,* 337 F. 2d 993 (3rd Cir. 1964); *Servette, Inc. v. NLRB,* 310 F. 2d 659 (9th Cir. 1962). Petitioner will not attempt a further presentation of the detailed evidence in this case at this time, but would point out to the Court that the Decision of the Court of Appeals is in direct conflict with that very Court's earlier Decision in the case of *Arizona Public Service Co. v. NLRB,* supra. Petitioner has taken the liberty of reproducing the Opinion of the Court of Appeals in the *Arizona Public Service* case as Appendix D to this Petition because that case is in so many ways directly parallel to the fact situation presented in the instant case. Despite the similarity between these two cases, the Court of Appeals never gave any real analysis to the evidence before it and simply rubber stamped the Decision of the National Labor Relations Board by vague statements of substantial evidence, statements which simply are not supported by the record.

Finally, Petitioner would point out that the Decision for which Petitioner seeks review herein insults basic precepts of common sense. In finding that every single engineer officer in question was not a supervisor, the Court of Appeals and the Board have left a 51,000 ton ship steaming merrily along with no one in charge of the ship's engine room or engineering department except the Chief Engineer Officer, who does not even stand a watch in the engine room. This Decision has left a situation of a functioning engineering department in which no officer, except the Chief Engineer, who may or may not be available when needed, gives or can give orders of direction to anyone else.

C. *The Board Violated the National Labor Relations Act by Including Officers and Oilers in the Same Bargaining Unit.*

One of the bizarre aspects of this case is the Board's action of including oilers in the so-called "bargaining unit", an action that was given *carte blanche* endorsement by the Court of Appeals below. It is, to say the least, unusual since the Union never sought to represent oilers, the oilers never sought representation by the

Union, no evidence exists showing any oiler ever even desired representation by this or any other union, and there is no real evidence of any kind in the record of any community of interest between oilers and officers. Petitioner submits that the Court of Appeals' approval of such a unit is not only improper, in itself, but highlights the lack of consideration given the record in this case by that Court, especially since this is not an "election" case where the oilers will have an opportunity to express their desires, but is a "bargaining order" case.

Assuming, *arguendo,* that some of the engineer officers are not supervisors, it was, nevertheless, improper to include oilers in any bargaining unit with them. Before employees may be included together in any bargaining unit there must be an evidentiary showing that those employees have a definite community of interest, such as skills, training, working conditions, rates of pay, supervision and similar matters. See, e.g., *Barnes-Hind Pharmaceuticals,* 183 NLRB No. 38, 74 LRRM 1291 (1970); *Burndy Corp.,* 181 NLRB No. 85, 73 LRRM 1398 (1970); *Mock Road Super Duper, Inc.,* 156 NLRB No. 82, 61 LRRM 1173 (1966). The Board's Decision not only ignored these established principals, but went against its own precedent without any explanation as to why. The record in this case is totally devoid of any evidence showing the existence of any such community of interest between the oilers and ship's officers. On the contrary, most of the evidence shows distinct and significant differences between the two classifications. For example, the ship's officers received their licenses only after extensive testing by the United States Coast Guard. They are considered ship's officers and only they can be in charge of engine room watches. (46 U. S. C. Sections 224 and 224(a)). Licensed engineer officers are also generally graduates of maritime academies which are the equivalent of colleges. Oilers, on the other hand, are subject only to United States Coast Guard certification requiring little more than a showing of at least six months' sea service. (46 U. S. C. Section 672(e)). Further, in duties, an oiler is *always subordinate* and subject to the orders of any officer.

The testimony of one of the Engineer Officers, Robert Ahbel, summed up the feeling of all of the Officers toward the oilers when he testified that oilers and wipers are on the lowest end of the engine room totem pole. (Wipers occupy the position in a steamship equivalent to oilers in diesel powered vessels such as the *Hughes Glomar Explorer.)*

Most important, however, is the fact that absolutely no evidence exists to show that the Union ever sought to represent the oilers or that the oilers ever sought any union representation. No oilers appeared in the litigation below and no one purported to represent the oilers. Indeed, even the Union was surprised when the General Counsel of the Board stated that the Board was seeking to include oilers in a bargaining unit with officers. It is submitted that the only reason the Board decided to include oilers in the unit was to bolster the Board's position that the officers were not supervisors. Evidently, the Board had to have some basis, no matter how irrational, to ignore the fact that the Union evidently saw distinct differences between officers and oilers. Since the Union refused to try and organize oilers, the Board had to do it for them. Petitioner submits that the Board itself violated the National Labor Relations Act when it took an identifiable group of employees and imposed union organization on them without reference to their own desires. Such action is clearly in direct conflict with the basic requirements of Section 7 of the National Labor Relations Act, as amended, (29 U. S. C. Section 157), which protects employee rights to refrain from any or all concerted activities relating to collective bargaining as well as the right to join a union and participate in those concerted activities. See, e.g., *NLRB v. Granite State Jt. Bd., Textile Wkrs. Union, Local 1029,* 4029 U. S. 213 (1972). Petitioner submits that the oilers were included in the bargaining unit by the Board, not because it was proper, but only because the Board needed some kind of cosmetic application to justify decisions that were already completely untenable.

D. *Even if the Engineer Officers are not Supervisors, They are Professional Employees.*

Even if it can be assumed, *arguendo,* that some or all of the engineer officers were not supervisors, the Board certainly erred in including them in a bargaining unit with oilers because these officers certainly would qualify for the status of professional employees. Section 2(12) of the National Labor Relations Act, as amended, (29 U. S. C. Section 152 (12)), prevents the inclusion of professionals with other employees in a bargaining unit with non-professional personnel unless those professional employees vote to be so included. See, e.g., *Chrysler Corp. — Space Division, Michoud Operations,* 154 NLRB 352 (1965); *The Ryan Aeronautical Co.,* 132 NLRB 1160 (1961); *Western Electric Co.,* 98 NLRB 1018 (1952); *General Dynamics Corp., Convair Aerospace Div.,* 213 NLRB No. 124 (1974). Again, the Board failed to explain why it made such a drastic departure from established precedent and the clear mandate of the law. The record is replete with evidence establishing professional status of the marine engineer officers should they be found not to be supervisors. Some of these points are:

1. Licensed engineer officers must pass a series of rigid and extensive tests to qualify for their licenses and are subject to constant review and retesting, whereas oilers do not have to undergo such procedures.
2. High educational standards, including 3 to 4 years of college level study with concentration in marine engineering are common today for licensed engineer officers.
3. The day to day responsibility for millions of dollars worth of equipment and the safety and well being of the ship and its crew are all in the sole control of the engineer officers qualified to stand watch.
4. Special legal rights, duties and responsibilities are imposed on officers by law that are never given to non-licensed personnel such as oilers.
5. Licensed engineer officers possess status as ship's officers with accompanying rights, powers and privileges.

The NLRB's decision did indeed recognize many of the foregoing points, but it appears that they were totally forgotten in considering the unit issues.

E. *Any Possible Union Majority Resulted from Illegal Supervisory Coercion and Influence.*

The very existence of the issue of supervisory instigation and influence in this case possibly accounts (at least in part) for the blatantly erroneous decisions of the Board and Court of Appeals on the supervisory issues. Further, the existence of this issue possibly accounts for the Court of Appeals and the Board's studious avoidance of any attempt to consider the supervisory status of the engineer officers as individuals or by their respective classifications as first, second or third engineer officers. Had even one of the engineer officers in question been found to be a supervisor, the Court of Appeals or the Board itself would have then had to face the equally vexing instigation issues. It would have been difficult indeed to ignore, for example, the specific finding of the Administrative Law Judge "that First Assistant Engineer Smith, a member of the MEBA for 25 years, was the most active individual in organizing the engine department" (A 17). Nor could the Court of Appeals or the Board have ignored the undisputed evidence which shows that as the newly licensed, inexperienced third engineer officers joined the ship they met in private with either the first or second engineer officers where they were "persuaded" (or possibly ordered) to sign authorization cards and to support the Union.

Petitioner will not belabor the Court at this point with an extensive discussion of the specific evidence in the record. Petitioner will say, however, that the evidence establishing the supervisory influence in the Union's organization drive aboard the *Hughes Glomar Explorer* is overwhelming and uncontradicted. This is not a case in which Union officials or employees organized from the outside, but rather one in which the older, more experienced and higher rated engineer officers openly imposed

their will on younger, less experienced officers who were under their command. This Court has noted the inherent unreliability of authorization cards as a basis for bargaining orders and has admonished both the lower courts and the Board that great care must be taken in considering charges of improperly solicited authorization cards in order to insure employee free choice. See, e.g., *NLRB v. Gissel Packing Co.*, 395 U. S. 575 (1969). This is a case in which this Court's warnings on this point have been completely ignored. Despite the overwhelming evidence, and evidently to meet a preconceived goal, the Board carefully avoided any real analysis of the issue of supervisory instigation and influence by the use of vague generalities and by the method of finding that the organizers were not supervisors, despite overwhelming evidence to the contrary. Everything had to fit together, no matter how strained it might be, to reach the desired result.

Finally, the question has to be asked, would the Maritime Engineers Beneficial Association, a Union well known to take pride in its claims of being a supervisor's union,[2] and sophisticated and well versed in the law, have allowed such improper and overwhelming solicitation and instigation by known supervisors if the Union had not, from the first, known and accepted the fact that the engineer officers on the *Hughes Glomar Explorer* were in fact all supervisors? Petitioner submits that it would not have done so and the fact that the Union not only allowed, but encouraged such activities by supervisors (including the Chief Engineer Officers who were stipulated to be supervisors) is

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[2]The fact that the Marine Engineers Beneficial Association historically has considered licensed marine engineer officers to be supervisors is perhaps best seen in a provision in the 1969 Collective Bargaining Agreement between the Union and Pacific Coast Maritime Association (an association of six major U. S. Flag steamship companies) which states in section 1 (a):

> "The Parties agree that all of the engineers to whom this Agreement is applicable are 'supervisors' within the meaning of the Labor Management Relations Act of 1947, as amended."

itself significant evidence in this case. Also, if the Union honestly believed that the engineer officers were not supervisors then why was no effort made to organize the oilers in the engine room, if as the Board in effect found, the engineer officers were nothing but oilers with glorified titles.

F. *Petitioner was Denied its Constitutional and Statutory Rights to a Fair Judicial and Administrative Review*

Since the record reflects undisputed evidence that the ten engineer officers possessed indicia of supervisory power and authority, evidence which has been totally ignored by both the Court of Appeals and the Board, one is compelled to the conclusion that both the Court of Appeals and the Board gave decisive weight to the fact that Petitioner did not come forward and produce witnesses in its own behalf. One is also compelled to the conclusion that both the Court of Appeals and the Board considered the evidence presented on *direct examination* by the charging party to be the only relevant evidence, never giving any considration to cross-examination testimony, despite the fact that it is generally acknowledged that cross-examination testimony is generally closer to the truth than the prepared evidence presented on direct examination. The Board's position on this issue can be clearly seen by the following statement from the Administrative Law Judge's decision (A-23):

> "While the Respondent's answer denied the 8(a)(1) and (3) allegations of the complaint, it offered no evidence to refute the testimony of the General Counsel's witnesses."

At another point in the Administrative Law Judge's decision a similar statement was made in a footnote (A-10) as follows:

> "Respondent called no witnesses to rebut the testimony of the General Counsel's witnesses."

This obvious reliance on only the direct testimony of a prepared witness is simply not enough to support any finding, much less a finding of unfair labor practices, and certainly constitutes an

illegal shifting of the burden of proof from the General Counsel to Petitioner. See, e.g., *NLRB v. Ogle Protection Service Inc.*, 375 F. 2d 497 (6th Cir 1967); *NLRB v. Barberton Plastics Products, Inc.* 354 F. 2d 66 (6th Cir. 1965). The Board's failure in this regard was magnified immeasurably when the Court of Appeals did precisely the same thing and simply disregarded cross-examination testimony, all in direct violation of this Court's requirements that the Court of Appeals review the record as a whole. *Universal Camera Corp. v. NLRB,* supra.

Petitioner did indeed rest without producing a witness in its own behalf. Although Petitioner is satisfied that the facts elicited on cross-examination of the General Counsel's witnesses, and the existence as a matter of law of the powers and authorities granted to a ship's officers by federal maritime statutes, do establish beyond any doubt the supervisory status of the engineer officers in question, it has obviously been held against Petitioner that it did not proceed with its own witnesses. A major consideration of Petitioner in not presenting witnesses is that Petitioner could not take the risk of exposing its management and other personnel to cross-examination because of the requirements of governmental secrecy and security. Petitioner has already mentioned the fact that the *Hughes Glomar Explorer* was and even now is owned and controlled by the United States Government, and that the ship was designed, built and operated in a highly classified and secret governmental project. At the time that this case was tried before the Administrative Law Judge *even the fact of government ownership* was an extremely sensitive and highly classified secret. Only later were certain aspects of government ownership of the *Hughes Glomar Explorer* and its operations declassified for use in other litigation, and even now only certain aspects of the matter can be revealed. The constraints and limitations placed on Petitioner by the United States government and the sensitivity of the matters involved can be seen in the contract under which Petitioner operated the ship for the government

(a portion of which is reproduced as Appendix E) and in later statements made in affidavits by government officials in other litigation which are reproduced as Appendices F and G to this Petition. Petitioner could not put those of its personnel on the stand who could have testified as to the relevant facts to reinforce the record already established without exposing those witnesses to the alternative of either revealing classified government information or facing the possibility of committing perjury to protect those secrets. In this regard, Petitioner asks that the Court understand that any such witness could not have declined to testify on the basis of governmental restrictions because such reliance in itself would have revealed governmental participation in the project. Also, even though certain of these facts had been made public either in news revelations or other unrelated litigation by the time this case was argued in the Court of Appeals, Petitioner was confined to the record and could not go into such matters. Surely, it is of vital importance to establish the principle that a private company which is compelled to operate under government imposed secrecy based on national security should not be placed on the horns of such a dilemma.

Petitioner does not believe that this matter would have been of importance had proper review of the record been had before the Court of Appeals. Petitioner submits that the record is ample as to the supervisory status of these ten engineer officers, especially since the relevant evidence in that record comes out of those officers' own mouths. However, if this Court feels that the Petitioner should have come forward with its witnesses, then it asks that this Court remand this case and give Petitioner the opportunity to present witnesses in its own behalf, with adequate safeguards to protect those matters of governmental interest that remain secret and are irrelevant to any issue in this case.

CONCLUSION

For the reasons set out hereinabove the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

SMITH SMITH DUNLAP & CANTERBURY

Ewell Lee Smith, Jr.

George C. Dunlap
Counsel for Petitioner

Of Counsel

SMITH SMITH DUNLAP & CANTERBURY
BOWEN LOUIS FLORSHEIM
TAYLOR HANCOCK

On the Petition

CERTIFICATE OF SERVICE

This is to certify that on the 3rd day of May, 1976, three true and correct copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit was served on counsel of record for each respondent by depositing the same in the United States Mail with first class postage prepaid and addressed to:

William M. Bernstein, Esq.
Office of the General Counsel
National Labor Relations Board
Washington, D. C. 20570

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Ewell Lee Smith, Jr.

APPENDIX

APPENDIX A

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

GLOBAL MARINE DEVELOPMENT
OF CALIFORNIA, INC.

and **Case 31 — CA — 4019**

DISTRICT 1, PACIFIC COAST
DISTRICT, MEBA, AFL-CIO

DECISION AND ORDER

On June 13, 1974, Administrative Law Judge James S. Jenson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and General Counsel and Charging Party filed briefs in opposition to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.[2]

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[1]The Respondent has alleged that the Administrative Law Judge demonstrated a bias against Respondent and its position in the instant case. We have carefully considered the record and the attached Decision and find no basis for these charges of bias alleged by Respondent.

[2]The Respondent's request for oral argument is hereby denied as the record and exceptions in our view adequately present the issues and positions of the parties.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Global Marine Development of California, Inc., Los Angeles, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. Oct. 22, 1974

Edward B. Miller,
Chairman

John H. Fanning,
Member

John A. Penello,
Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

GLOBAL MARINE DEVELOPMENT
OF CALIFORNIA, INC.

and

DISTRICT 1, PACIFIC COAST
DISTRICT, MEBA, AFL-CIO

James T. Winkler, Esq., of
Los Angeles, Calif., for
the General Counsel.

Smith, Smith, Dunlap & Canterbury,
by *Lee Smith, Esq.*, and *George C. Dunlap, Esq.*, of Dallas, Texas,
for the Respondent.

Markowitz and Glanstein, by *Richard H. Markowitz, Esq.*, of New York, New York; and *Bodle, Fogel, Julber, Reinhardt & Rothschild*, by *Lester G. Ostrov, Esq.*, of Los Angeles, Calif.,
for the Charging Union.

DECISION

Statement of the Case

JAMES S. JENSON, Administrative Law Judge: This case was heard before me in Los Angeles, California on January 14, 15, 16 and February 19, 1974. The complaint, which issued on November 29, 1973, was amended on December 10, 1973 and at the trial, was based on a charge and first amended charge filed on

October 9 and November 28, 1973 respectively. The complaint alleges violations of Section 8(a)(1) and (3) and seeks a remedy requiring Respondent to recognize and bargain with the Union. Specifically, the complaint as amended alleges that a unit comprised of first, second and third assistant marine engineers and oilers employed on Respondent's vessel, the Hughes Glomar Explorer, is appropriate; that since August 10, 1973, the MEBA has represented a majority of the employees in said unit; that on various dates from early August to September 25, 1973, Respondent engaged in various acts and conduct in violation of Section 8(a)(1); and on September 25 and October 1, 1973 terminated 10 first, second and third assistant marine engineers because of their membership in the MEBA in order to undermine and destroy the Union's majority status and in order to evade any obligation to bargain with the MEBA, all in violation of Section 8(a)(3) of the Act.

By its answer and amended answer, Respondent admitted the procedural and jurisdictional allegations of the complaint but denied the remaining substantive allegations, pleading affirmatively that the alleged discriminatees were at all times supervisors within the meaning of the Act. In an amended answer filed at the trial, Respondent denied the appropriateness of the unit on the ground it included licensed engineering officers who are supervisory personnel, with oilers who are nonsupervisory personnel; that there is no community of interest between the licensed engineering officers and oilers; and that the licensed engineering officers, in addition to being supervisor, are technical and/or professional employees and the oilers are not.

All parties were given full opportunity to appear, to introduce evidence, examine and cross-examine witnesses, to argue orally and to file briefs. Briefs were filed by the Respondent, the Charging Party and the General Counsel.[1]

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[1]After the time for filing briefs expired, Respondent submitted a letter supplementing its brief by calling attention to a Circuit Court decision, a copy of which was attached thereto. In the absence of objection by either the General Counsel or Charging Party, I have considered the case cited therein, which, in any event, does not affect my findings and conclusions reached hereinafter.

Upon the entire record in the case,[2] and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. Jurisdiction

Respondent, a California corporation, is engaged in the operation of the deep-sea mining and exploration vessel, Hughes Glomar Explorer. In the course and conduct of its deep-sea mining and exploration business operations, Respondent annually purchases and receives goods and services valued in excess of $50,000 directly from outside the State of California. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

District 1, Pacific Coast District, MEBA, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *Background*

During the early part of 1973,[3] the Hughes Glomar Explorer was under construction at the Sun Shipyard in Chester, Pennsylvania. In late July, the ship left on the first of two legs of a shakedown cruise, the first leg ending in Bermuda on or about August 9, and the second leg ending in Long Beach, California on October 1. It appears from the testimony that the Hughes Glomar Explorer is a unique type vessel in that it was designed to mine or remove manganese nodules from the ocean floor, and carries a crew somewhat larger than the ordinary merchant vessel. A general superintendent appears to be in overall charge of the ship which is divided into the following departments: mining, deck, engine and stewards. The mining department is comprised of approximately 40 employees. Its supervisory hierarchy consists of the superintendent of operations, an assistant superintendent of operations and an undisclosed number of foremen. The steward's

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[2]In view of my findings and conclusions hereafter, Respondent's motion to dismiss the complaint is denied.

[3]All dates are in 1973 unless otherwise stated.

department has approximately nine employees and is directly supervised by the chief steward. The deck department has approximately 20 employees and is under the supervision of the captain and chief mate. The employer also classifies and considers the bos'n and the second and third mate as supervisors. Each crew in the engine department is comprised of approximately 10 individuals, consisting of a chief engineer, and first, second and third assistant engineer and oiler categories.[4] The General Counsel and the MEBA contend the first, second and third assistant marine engineers who served on both legs of the vessel during its shakedown cruise, all of whom signed authorization cards, are employees, while the Respondent contends they are supervisors. The General Counsel further contends that a unit including the first, second and third assistant marine engineers and oilers is appropriate. The MEBA, while requesting recognition in a unit of first, second and third assistant marine engineers, contends both a unit limited to those individuals, and a unit which also includes the oilers is appropriate. As noted above, Respondent contends the three categories of assistant marine engineers are supervisors and that those individuals and the oilers lack a community of interest. Respondent further contends the authorization cards are invalid because of supervisory solicitation and instigation. Thus, the issues are:

> (1) Whether the 10 assistant marine engineers employed on the Hughes Glomar Explorer are supervisors within the meaning of the Act;
>
> (2) Whether the authorization cards signed by the assistant engineers are void because of alleged supervisory solicitation and instigation; and
>
> (3) Whether a unit limited to the assistant engineers, or one also including the oilers is appropriate.

Insofar as the engine department is concerned, Respondent employed two crews which were designated as A and B crews.

[4]The parties stipulated that the general superintendent, superintendent of operations, assistant superintendent of operations, foremen, chief steward, captain, chief mate and chief engineer are supervisors within the meaning of the Act. The numbers of individuals in each of the departments is based on the unrefuted and credited testimony of first assistant engineer John Smith.

The A crew was on the ship from at least the time it left the Sun Shipyard until it reached Bermuda on August 9, at which time it was replaced by the B crew which brought the vessel around South America, arriving in Long Beach on October 1. It was contemplated that the two crews would alternate thereafter, i.e., while the A crew was at sea, the B crew would be at home, and vice versa.

In addition to Chief Engineer Anthony, the A crew consisted of first assistant engineer McDonald, second assistant engineer Kell, third assistant engineers Aikens, Frederickson and Ahbel, and oilers Ouellette, Kaun and McKiney. The B crew was composed of Chief Engineer Stackhouse, first assistant engineer Smith, second assistant engineer Brookshire, third assistant engineers Ahbel, Welty, Adamis and Peel, and oilers Pope, Madden and Richards.[5]

B. *Disputed Supervisory Status*

With the exception of the chief engineers,[6] the engine department personnel — first, second and third assistant engineers and oilers — were assigned to four overlapping shifts, each man working a continuous 12-hour tour of duty which was divided into a 6-hour watch shift and a 6-hour maintenance shift. Two licensed assistant engineers were on watch at all times, the watch engineer being located in the control room in accordance with Coast Guard

[5]The following terms were used interchangeably throughout the trial: first, second and third engineers; first, second and third marine engineers; and first, second and third assistant engineers. The dates of hire for the assistant engineers on duty on the Hughes Glomar Explorer were: *A crew* — Frederickson — December 4, 1972; Kell — November 7, 1972; McDonald — June 18; Aikens — July 17; Ahbel — July 28. *B crew* — Welty — March 1; Smith — April 9; Brookshire — May 22; Ahbel (served on both A and B crews, see above); Peel — August 9; Adamis — August 10. With the exception of Ahbel who served on both crews, all assistant engineers on the A crew were terminated on September 25, and those on the B crew were terminated on October 1. "A crew" Chief Engineer Anthony was terminated on September 25 and "B crew" Chief Engineer Stackhouse was terminated on October 1.

[6]The parties stipulated that Chief Engineers Anthony and Stackhouse were supervisors within the maning of the Act.

regulations, and the maintenance engineer who ordinarily worked in the engineroom doing maintenance and associated work. Each engineer stood successive control room and maintenance watches. The engineer standing watch in the control room was designated the "watch" engineer, and the one on maintenance duty, the "maintenance" engineer. An oiler was also assigned to each of the watches so that two oilers were on duty at all times.[7]

The composite testimony of the assistant engineers, all 10 of whom testified, establishes that all of the work performed by the "watch" engineer and the oiler on the corresponding watch is routine. The watch engineer stands his 6 hours of watch in the control booth in accordance with Coast Guard requirements, where, according to first assistant engineer Smith, he monitored the ". . . different alarms which show any change of condition in the machinery. Regulating voltages and kilowatt loads on the generators. We also had a diesel engine exhaust temperature indicator which we monitored from that point, and checked the temperatures and pressures that the oiler brought up on the oiler's log sheets and made certain entries into the engineroom official log book, concerning certain temperatures . . . and the pressures . . . we also entered certain electrical readings in the log book." The oiler on the corresponding watch makes hourly rounds of all machinery in the engineering spaces, taking readings every second hour which he records in the oiler log sheets, some of which are recorded by the watch engineer in the engine room log book. While he has no duties to perform there, the oiler spends from 1 to 2 hours of his shift passing time in the control room talking to the watch engineer. The watch engineer also relays specific instructions from the chief engineer to the maintenance engineer regarding what is to be done on the maintenance watch.[8]

[7]As there were only three oilers on both the A and B crews, third assistant engineers performed the duties of the fourth oiler on both crews, Ahbel (and for a short time Aikens) on the A crew, and Adamis and Peel on the B crew. These four third assistant engineers graduated from the California Maritime Academy in July, having received Bachelor of Science degrees in maritime engineering after a 3-year course of study.

[8]Upon instructions from Chief Engineer Anthony, first assistant engineer McDonald made up a list of jobs that needed to be done in the engineroom by the crew. Any assistant engineer or oiler could add

Each of the watch engineers was assigned an area of responsibility by the chief engineer, the first assistant engineers on each crew, McDonald and Smith being responsible, along with third assistant engineers Frederickson and Welty on the A and B crews respectively, for the main engines and associated equipment. Second engineers Kell on the A crew and Brookshire on the B crew were responsible for the fuel oil, bilge and ballast systems and associated machinery. Third assistant engineer Ahbel on the A crew, and presumably Aikens on the B crew, had prime responsibility for the evaporators and high-pressure air compressors. The maintenance work with respect to those areas of responsibility was performed by those individuals on their maintenance shifts, the maintenance shift in each individual's case following immediately his shift as watch engineer. The oiler on the maintenance shift, or the third assistant engineer doing oiler work, worked along with the maintenance engineer. In addition to doing routine maintenance work in their specific areas of responsibility, the maintenance engineers and oilers performed the unfinished necessary maintenance work of the previous maintenance shift, and other manual routine work such as fixing leaks, scraping and painting deck plates, painting handrails, tracing and color-coding valves, sweeping and keeping the engine and control rooms clean, changing oil in the compressors, cleaning up oil spills, pumping bilges, cleaning purifiers, etc. One of the oilers on the A crew, Ouellette, was also a welder. He spent all of his time on welding jobs which were assigned to him directly by the chief engineer. Upon his own request, he was sometimes assisted by one of the assistant engineers. One of the third assistant engineers, Aikens, took over Ouellette's oiler duties.

Each of the 10 assistant engineers testified that he had never exercised, nor had he been advised that he had the authority to

to the list, which Anthony reviewed on a daily basis, adding to or deleting jobs, and assigning priorities to jobs. On the B leg of the trip, Chief Engineer Stackhouse met with first assistant engineer Smith every morning and told him what items he wanted done that day. Smith recorded the jobs in a "little workbook." As Smith was relieved on the maintenance watch by Ahbel, "he (Smith) would outline a rough program of things to do during my 6 hours." Every evening Stockhouse went to the engineroom and told second assistant engineer Brookshire what jobs he wanted done, and on numerous occasions told the oiler directly what he should do.

recommend or exercise any of the following authorities: reprimand, discipline, discharge, grant time off, grant shore leave, prepare evaluations, attend staff meetings, hire, interview for employment, grant pay raises, or authorize overtime.[9]

Respondent contends, however, that the assistant engineers not only possessed supervisory powers, but exercised them on a day-to-day basis. As indicative, Respondent contends that when first assistant engineer Smith was on maintenance watch, the oilers reported to him for their assignment. It is clear, however, that when Smith was on maintenance watch, he and an oiler worked together, and that Smith was told what work was to be done by the chief engineer. In fact, the record is void of evidence demonstrating the authority on the part of the assistant engineers to make independent assignments. Non-routine work resulted when there was a failure of some piece of equipment which required that corrective action be taken. While it was within the aura of the watch engineers responsibility to see that corrective action was taken, the work routinely fell on the maintenance engineer and oiler. Even in emergency situations it appears it was the responsibility of the maintenance engineer and oiler to effect repairs, and if the emergency was such that it required a change in the speed of the vessel, the watch engineer immediately notified the bridge and the chief engineer came to the engineroom spaces and determined the repairs required. Further, Smith testified that the watch engineer lacked authority to pull the maintenance engineer and oiler off a job and assign them to another job.

Respondent contends Smith exercised supervisory authority during the training period of Adamis and Peel by assigning them watch standing duties. The evidence shows that third assistant engineers Adamis and Peel boarded the ship in Bermuda and, after a brief period of standing watch with an oiler in order to become familiar with the vessel, were assigned to stand watches as oilers with third assistant engineer Ahbel who stood both the watch engineer and maintenance watches. Friction arose among the three due to the fact they were about the same age and had all graduated in the same class at the California Maritime Academy. When Peel complained to Smith about the situation, Smith

[9]Respondent called no witnesses to rebut the testimony of the General Counsel's witnesses.

stated there was nothing he could do. Approximately a week later Peel again complained and Smith again told him there was nothing he could do. When Peel then advised Smith that the situation was intolerable and "I am just not going to make it down to the watch anymore," Smith stated he would see what he could do about it and contacted Chief Engineer Stackhouse with the recommendation that Adamis and Peel be switched from Ahbel's watch to Smith's watch, and that Pope serve as oiler with Ahbel. Chief Engineer Stackhouse approved the switch and thereafter Adamis and Peel were on watch duty with Smith who had them alternate between the control room and oiler's watches. When Smith felt that the two were qualified to stand the control room watch alone, Smith went into the engineroom and helped out the engineer and the oiler on maintenance watch. Moreover, the chief engineer had instructed Smith to come to him for any changes in personnel or machinery.

Respondent also alleges Smith assigned the oilers to their various watches. Smith testified as follows:

> Well, like I say, Mr. Brookshire selected Madden as his oiler and Bob Ahbel, Adamis and Peel they more or less selected each other. I believe that Tim Welty, he had worked with Don Richard before and so they more or less selected each other and I wrote all this up in this order. That left Herb Pope and I asked him if he would like to stand watch with me, and he said sure, I will stand watch any time, any place — that type of thing — very willing. So I wrote it up in that manner. I took it to the chief engineer who I located in the engineroom at that time, He rejected it and changed it — had me change it — and I submitted it to him once again the way he wanted it and he approved it and I posted it in the engineroom.

Respondent contends "Smith personally and effectively recommended the discharge of an engineer named Secondine." Smith testified that before the vessel left the shipyard, he recommended to Chief Engineer Anthony that Secondine be terminated because of his absences and that "the chief engineer — Mr. Anthony — he threw up his hands in the air and said I can't hire or fire anybody." While it appears Secondine was in fact terminated approxi-

mately a week later, the reason for the termination was not shown, nor that Smith's recommendation had anything to do with it.

Respondent's contentions regarding the alleged supervisory authority of first assistant engineer McDonald are similar to those it raised with respect to first assistant engineer Smith and are equally without merit.

With respect to Respondent's contention that the assistant engineers had the power to effectively recommend disciplinary action against oilers or other subordinates, the undisputed evidence shows that if a Coast Guard regulation was violated, the most an assistant engineer could do was to either report the infraction to the chief engineer, who in turn would report it to the ship's master, or "log" the incident in the engineroom log. While it was not shown that this had ever happened on the Hughes Glomar Explorer, in any event it does not appear the assistant engineer would make any recommendation with respect to any disciplinary action to be taken. Disciplinary action, if any, would be determined by the Coast Guard.

With respect to the authority of the watch engineer over other personnel working in the engineroom, second assistant engineer Kell testified, without contradiction, that he was informed by either Mining Superintendent Blurton or Rogers that he had no authority over a shipboard electrician named Snyder. He further testified that while the watch engineers should be in control in case a controversy arose between an electrician and a watch engineer, such was not the case on the Hughes Glomar Explorer. The evidence further revealed that while members of the mining crew occasionally performed duties in the engineroom, they neither reported to, nor received any direction from, the watch engineer. Moreover, as noted above, the watch engineer was without authority to pull the maintenance engineer and oiler off one job and assign them to another.

A further incident showing the lack of authority resting in the assistant engineers on the vessel involved second assistant engineer Kell. One day while making rounds, he discovered mining department personnel pumping oil over the side of the vessel, an offense which could have resulted in substantial fines and license suspensions for him and the chief engineer. He testified, "Well, I tried

to make them stop; tried to get them to stop and they told me, well, in kind of crude language, to get away from there, get out of there . . ." The mining department personnel continued pumping oil over the side. On another occasion, third assistant engineer Frederickson asked one of the electricians to take a reading on a certain circuit. The electrician refused on the ground he worked for the chief engineer. Frederickson reported the incident to the chief engineer who confirmed the fact the electrician worked under him. Further evidence showing the lack of authority on the part of the assistant engineers involved third assistant engineer Ahbel and oiler Pope. Ahbel asked Pope to do some welding, to which Pope replied, "They ain't paying me to be a welder." Ahbel did the welding himself and Pope "stood around just as a fire watch." Asked whether he could have disciplined Pope, Ahbel replied, "No. There is nothing I could have done." The issue of working overtime arose on one occasion. Following is first assistant engineer Smith's testimony on the subject:

> A. Early in the voyage there was a lot of work just getting organized in the ship and we needed some manhours to get some of these items done and I checked with the chief engineer to see what the procedure was for having people work over their 12 hour day.
>
> He wasn't entirely sure about the procedure but he felt that there would be overtime and he would check and find out, but in the meantime I was to go ahead and get the work done and get these jobs completed if possible and he would continue checking and he instruced me to ask these people to inform them that he wasn't sure they would get this overtime or collect it but he would make an entry in the log book.
>
> He had some form that he thought the company had that he would fill out and would indicate hours that people worked.
>
> That is the basis upon which we proceeded.
>
> These people actually volunteered and turned to when I asked them.
>
> Q. When you asked them did any of them turn you down and say no, I am not going to work overtime?

A. No.

Q. If they would have did you have the authority to force them to work overtime?

A. No.

Q. Did you ever get overtime pay?

A. No.

Q. Did they ever get overtime pay?

A. To the best of my knowledge they did not.

While assistant marine engineers may be endowed with considerable responsibility in the operation of some vessels, which of necessity is accompanied by authority over unlicensed personnel which would render them supervisors, that situation does not appear to be the case on the Hughes Glomar Explorer. First assistant engineer McDonald explained the differences in the duties of the first assistant engineer as follows: "Well, the first assistant on normal merchant ships, . . . he generally takes care of all repair work. He never stands a watch and he is on call 24 hours a day more or less like the chief. In emergency, he is right there at all times. On this vessel, I was never called out anytime off watch. I had no telephone in my room so they could call me. Now on other ships they generally have a telephone for the first assistant."[10] Third assistant engineer Adamis testified that it was his understanding upon graduating from the California Maritime Academy, that the first assistant engineer worked a 40-hour, 5-day week, was in charge of the main engineroom. overtime, the wipers, and did not stand a watch. Adamis served aboard the vessel S S Kopaa until a few days before the opening of the hearing. He testified while the first assistant engineer on that vessel "was a day worker," he was on 24-hour call, did not stand a watch, was in charge of the engineroom and the wipers and handled overtime for all engine department employees. There were no wipers employed on the Hughes Glomar Explorer. Adamis testified that wiper's work, which "consists of scraping, painting, cleaning the engineroom, cleaning up oil, sweeping, emptying the garbage cans,

[10]The chief engineer is the only one in the engineer department on the Hughes Glomar Explorer with a private room and telephone.

cleaning bilges — whatever the first assistant told you to do. It was mostly the lowest class work in the engineroom — the cleanup work" was performed by, among others, first assistant engineer Smith. Contrary to the first assistant engineer on the S S Kopaa, Smith spent from 50 to 60 percent of his time doing wipers work. The duties of the first assistant engineer on the S S Sea Train Georgia — which Ahbel served on immediately preceding the trial of this matter — were the same as those testified to by Adamis on the S S Kopaa.

Respondent contends the powers and authority conferred by law on the first, second and third assistant engineers by reason of their being licensed by the United States Coast Guard, is sufficient to classify them as supervisors under Section 2(11) of the Act. The Board, however, has taken a contrary view. In *Graham Transporation Company,* 124 NLRB 960, the Board stated at 962:

> We also find no merit in BME's final contention that some of the engineers involved herein are supervisors because they are licensed by the United States Coast Guard. In determining the supervisory status of marine engineers, whether or not they are licensed, we have always utilized the same tests which are applicable to other industries. Thus, where it has been clearly established that marine engineers have the authority expressed in Section 2(11), we have found them to be supervisors, but where they possess no such authority, we have found them to be non-supervisors. To be sure, the Board has customarily treated licensed marine engineers as supervisors, but in those cases, it was clear from the size of the ship and crew that there were other engineroom personnel for the engineers to supervise. The fact that a marine engineer possesses a Coast Guard license does not alone support a finding of supervisory status.[11]

With respect to Respondent's contention that the watch engineer has sole and full responsibility for the entire engine department, the record indeed establishes his responsibility for the machinery. However, "responsibility for the maintenance of phys-

[11]Accord, *Great Lakes Towing Company,* 168 NLRB 695; *Material Service Division, General Dynamics Corp.,* 144 NLRB 908.

ical property does not, of itself, establish the existence of supervisory authority."[12] The facts set forth above disclose that such direction the watch engineer gives to personnel, being the oiler on maintenance, are clearly of a rountine nature and do not require the use of independent judgment. The oiler on duty with the watch engineer makes routine rounds of the engine spaces which precludes the exercise of independent judgment. The relationship of the watch engineer to the maintenance engineer and the oiler is much the same. While the watch engineer is responsible for the "operation" of the physical property, the maintenance engineer is responsible for its "maintenance and repair." The maintenance engineer and oiler perform rountine maintenance and repairs and in emergencies, nonroutine repairs. The maintenance engineer, a skilled mechanic, works in conjunction with the maintenance oiler and no doubt directs the oiler in the repair of the macihnery. However, the relationship of the maintenance engineer to the maintenance oiler in regards to these functions is more akin to a skilled mechanic-helper relationship than that of a supervisor-employee one, and does not involve responsible direction.

In sum, I conclude and find that the assistant engineers employed on the Hughes Glomar Explorer lack any of the indicia of the authorities specified in Section 2(11) of the Act, and are not, therefore, supervisors within the meaning of the Act. *Great Lakes Towing Company, supra; Material Service Division, General Dynamics Corp., supra; Graham Transportation Company, supra;* see also *A. L. Mechling Barge Lines,* 192 NLRB 1118.[13]

[12]*Graham Transportation Company, supra,* at 962.

[13]Respondent contends the facts here are remarkably similar to those in *Midwest Towing Co.,* 151 NLRB 658. While the jobs performed by the engineers and oilers in that case were indeed similar to the jobs performed by the assistant engineers and oilers on the Hughes Glomar Explorer, the authorities possessed by the engineers in the two cases is in no wise similar. Contrary to the facts in the instant case, in *Midwest,* the engineers assigned the oilers nonroutine duties, responsibly directed them in the performance of their duties, authorized extra payment for overtime and penalty time, disciplined oilers for misconduct, and effectively recommended action as to hire, retention, transfer or dismissal. In *Globe Steamship Company, et al.,* 85 NLRB 475, also cited by Respondent, the assistant engineers possessed the authority to effectively recommend the hire, discharge, disciplining, and promotion of the unlicensed engine department personnel, and the settlement of their grievances.

C. *Validity of Authorization Cards*

Having found that the first, second and third assistant engineers are not supervisors within the meaning of the Act, I find no merit in Respondent's contention that the authorization cards are invalid because of any influence exerted by any of the first, second or third assistant engineers on each other. There remains for consideration, however, the issue of whether the participation of Chief Engineers Anthony and Stackhouse in obtaining the cards was such that the cards are void. The 10 alleged discriminatees, all of whom testified, comprised all of the first, second and third assistant engineers employed on the Hughes Glomar Explorer from August 1 to October 1. Neither Chief Engineer Anthony nor Chief Engineer Stackhouse testified. Each of the 10 assistant engineers signed an authorization card reading:

> I hereby authorize The Nation MEBA to represent me in any and all negotiations relative to collective bargaining with my present or any future employer.
>
> This authorization shall continue in full force and effect until I have revoked same by written revocation delivered to the secretary-treasurer of said union.

There is no evidence to indicate any of the authorizations were revoked.

It appears from the record that first assistant engineer Smith, a member of the MEBA for 25 years, was the most active individual in organizing the engine department. He testified to having attended three meetings about the Union at the Brass Rail, a cocktail lounge near the Philadelphia Airport, in the latter part of April and early May. His authorization card, along with those of Kell and Frederickson, is dated May 9. Welty, whose card is undated, testified that he signed his card at the same time Kell and Frederickson signed. While Smith testified that Chief Engineer Anthony also signed a card, attended union meetings and helped organize "to some extent," it appears from the record that the extent of Anthony's involvement was limited to his signing a card and attendance at meetings. Chief Engineer Stackhouse's activities appear to have been similarly limited. Kell testified that while Anthony attended the May 9 Brass Rail meeting, he didn't pass out authorization cards, nor let it be known he favored the

Union; that it was not until a later date, after Kell had signed, that he learned Anthony was in favor of the Union. Frederickson testified that on May 9, union representative Kerestesy met with Smith, Kell, Welty, Frederickson and Chief Engineers Anthony and Stackhouse at the Brass Rail, that "it was a question and answer period with Mr. Kerestesy" answering questions about the Union; that Kerestesy stated what the Union had to offer; that he, Frederickson, asked Kerestesy for an authorization card which he signed; that he thought everyone asked for a card, but that he didn't know who had signed. Welty's testimony substantially parallels that of Frederickson. He asked Kerestesy for an authorization card which he signed along with the five others in attendance; and he didn't recall Chief Engineers Anthony or Stackhouse saying anything about the Union. Sometime in early June a meeting was held in the apartment which Kell and Frederickson shared. Union representative Kerestesy, Kell, Frederickson, Brookshire and Chief Engineers Anthony and Stackhouse were in attendance. Brookshire testified that Kerestesy "explained about the Union and their retirement and some of the pay scales," and was asked if he would like to sign an authorization card, which he did. He testified further that while Kell was the only other person that talked to him about an authorization card prior to the meeting, he concluded that everyone at the meeting was in favor of the Union. McDonald, a member of the MEBA since 1942, testified that he signed an authorization card approximately 2 weeks after he boarded the Hughes Glomar Explorer on June 18. Kell had asked McDonald and David Lucky, an assistant engineer who left the ship prior to its sailing for Bermuda, if they wanted to meet with Kerestesy. Neither Anthony nor Stackhouse was present when McDonald signed. Later, Anthony asked him questions about the Union. McDonald also discussed the benefits of the Union with other assistant engineers who had already signed authorization cards. Aikens, Adamis, Ahbel and Peel signed it in the engine control booth. He testified that he never attended any union meetings and that he never discussed the Union with the chief engineer. Ahbel, who had discussed the Union previously with both McDonald and Kell, obtained his card from Smith in the latter's stateroom while the vessel was in Bermuda. Ahbel knew that the chief engineers had already signed cards and were in favor of the Union. Ahbel also discussed the Union with Adamis and Peel, and told them if they were interested they should contact Smith. Adamis contacted Smith in his stateroom,

asked for a card and signed it. Peel testified that he also contacted Smith who handed him an authorization card and asked him to read it over and whether he wanted to sign it, assuring him, "Well, if you don't want to, you don't have to." After first declining, Peel returned in about an hour and signed it. Peel testified that Chief Engineer Stackhouse didn't talk to him about the Union.

Although all of the assistant engineers who signed cards appeared as witnesses and were subject to cross-examination by Respondent, there is not the slightest suggestion in the testimony of any of them that their designation of the Union was influenced by anything Chief Engineers Anthony or Stackhouse said or did. The evidence most favorable to Respondent's position is the testimony of Smith, who testified on cross-examination that Anthony signed an authorization card, attended union meetings and helped organize the crew "to some extent." The record, however, does not reveal any extent of participation in organizing efforts other than signing cards and attendance at union meetings when Smith, Kell, Frederickson, Welty and Brookshire signed cards. The testimony of Kell, Frederickson, Welty and Brookshire is completely void of any indication of influence exerted by either of the chief engineers. Nor does the record show that either Anthony or Stackhouse approached any employee for the purpose of soliciting an authorization card. Therefore, the evidence convinces me that Anthony and Stackhouse were "followers" rather than "leaders" in the organizational campaign and that their influence on the others, if any, was minimal.

Enforcing the Board's decision in 190 NLRB 174, the Fifth Circuit Court of Appeals in *N.L.R.B.* v. *WKRG-TV, Inc.* 470 F.2d 1302 (1973) stated at 1315:

> It is actual pressure and coercion we are seeking to avoid by our rule disallowing cards tainted by supervisory influence. A mechanical rule that requires a finding of supervisory solicitation in situations such as we have here, where there is no hint of intimidation, is too broad.
>
> Before the Board invalidates a card because of prounion supervisory solicitation, there must be some showing that the signing employee was subject to a reasonable appre-

hension that his failure to sign could have adverse consequences. Certainly a direct solicitation by a known supervisor could give rise to the necessary inference of reasonable apprehension. *E. g.,* N.L.R.B. v. Hecks, Inc., *supra,* 386 F.2d at 321. Similarly, active campaigning for the union by the supervisor even without actual solicitation, could in many circumstances necessitate a finding of improper solicitation. *See* Turner's Express, Inc. v. N.L.R.B., *supra;* (footnote omitted) N.L.R.B. v. Heck's, Inc., *supra,* 386 F.2d at 322.

There must be a more substantial exhibition of pressure than a passing remark or a statement of prounion conviction. So long as nothing in the words, deeds, or atmosphere of the alleged "solicitation" contain the seeds of potential reprisal, punishment, or intimidation, the involvement of the supervisors does not rise to the levels of supervisory "solicitation" that we condemned in *American Cable I, supra.* Here the supervisors attended a few union meetings and at various times made rather tame statements regarding their approval of the union. There is not a sufficient showing to throw out any of the cards, and the Board was correct in refusing to allow the minimal supervisory participation in this organization drive to frustrate the union's otherwise valid majority.

On the basis of the foregoing facts and authorities, I conclude and find that none of the authorization cards are invalid, and that on August 10, Respondent had valid designations as the collective bargaining representative of all 10 assistant marine engineers.

D. *Appropriate Unit*

Paragraph 8 of the complaint alleges that all first marine engineers, second marine engineers, third marine engineers and oilers employed by the Respondent on the Hughes Glomar Explorer, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, and further excluding all other employees of the Respondent employed on the ship, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the

Act. Paragraph 9 alleges that since on or about August 10, the Union has been the majority representative of the employees in said unit.

The record shows that by letter dated June 27, counsel for the MEBA advised Respondent that it represented "the vast majority of the marine engineers employed on your vessel . . ." and requested bargaining. The parties stipulated that on the following day the counsel for Respondent, in a telephone conversation with counsel for the MEBA, declined to grant recognition. On October 1, the MEBA filed a petition with the 31st Regional Office of the Board requesting an election in a unit limited to the marine engineers employed aboard the Hughes Glomar Explorer. The petition was not processed and on October 9, the charge initiating this proceeding was filed.

Respondent contends it would not be proper to include the engineers who are supervisors, with oilers, who are not supervisors; that there is no community of interest between the oilers and assistant engineers; and, the assistant engineers, in addition to being supervisors, are technical and/or professional employees and the oilers are not. I have previously found the assistant engineers are not supervisors. I further find that they are not professional employees as that term is defined in Section 2(12) of the Act. It is clear from the record that the work performed by the assistant engineers, working either as watch engineers, maintenance engineers or oilers, is not "predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work; (ii) involving the constant exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning . . . , as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes . . . ," nor was it shown that the chief engineers are professional persons so that working under their supervision would qualify the assistant engineers to become professional employees. Moreover, the Board does not automatically exclude technical employees from a unit

of nontechnical employees. Instead, the Board looks to see if there is a community of interest among the groups of employees, considering, among others, the following factors: "Desires of the parties, history of bargaining, similarity of skills and job functions, common supervision, contact and/or interchange with other employees, similarity of working conditions, type of industry, organization of plant, whether the technical employees work in separately situated and controlled areas, and whether any union seeks to represent technical employees separately." *The Sheffield Corporation,* 134 NLRB 1101, 1103-1104. Thus, even if the assistant engineers are technical employees, which I find they are not, the overriding consideration and unit placement is the community of interest, or lack thereof, between the assistant engineers and the oilers. A consideration of all relevant factors convinces me, and I find, that the assistant engineers and oilers share a community of interest and comprise an appropriate collective bargaining unit. The assistant engineers and oilers comprise all of the nonsupervisory employees in the engine department, they work side by side, each assisting the other, and are subject to the same supervision. Ahbel's initial training aboard ship, prior to assuming watch engineer status on the B crew, was as an oiler on the A crew. Aikens likewise performed oiler work prior to becoming a watch engineer on the A crew. Adamis and Peel alternated on oiler and watch engineer duties on the B crew. Thus, it is seen that the oilers and assistant engineers possess many of the same job skills and there is a constant interchange of job functions among some of the oilers and assistant engineers. Except for the period the watch engineer is on duty in the control room, the working conditions of the oilers and assistant engineers are similar, since they work together in the engineroom and related spaces. The record further establishes that all employees share the same dining room. While there was no showing that the assistant engineers and oilers enjoy the same employee benefits, the dissimilarity of benefits, if any, is peculiarly within the knowledge of Respondent who has chosen not to show them. Although the MEBA did not request recognition in a unit including the oilers, it is willing to represent them along with the assistant engineers. Further, there is no history of collective bargaining for the employees on the Hughes Glomar Explorer.

On the basis of the foregoing, I conclude and find that the assistant engineers and oilers have a community of interest and

that together they comprise an appropriate collective bargaining unit. The unit, at times material to this proceeding, consisted of four assistant marine engineers and three oilers on the A crew, and six assistant engineers and three oilers on the B crew, for a total of ten assistant engineers and six oilers. The MEBA, with valid authorization cards from each of the 10 assistant engineers, is and has been since on or about August 10, the exclusive representative of all first, second and third assistant marine engineers and oilers as alleged in paragraphs 8 and 9 of the complaint.

E. *Union Animus*[14]

While the Respondent's answer denied the 8(a)(1) and (3) allegations of the complaint, it offered no evidence to refute the testimony of the General Counsel's witnesses. Accordingly, I find that the preponderance of the evidence establishes that:

(1) On or about August 6, Respondent, through its agents Dean and Williams, promised employees improved benefits in the nature of pension, stock option and dental plans if they refrained from supporting the MEBA, and threatened that if the assistant marine engineers supported and selected the MEBA as their collective bargaining representative, that Respondent would not bargain collectively with the MEBA;[15]

(2) On or about August 7, Respondent, through its agents Crooke and Evans, promised employees improved benefits in the nature of pension and stock option plans if they refrained from supporting the Union, interrogated employees as to their reasons for supporting the Union, and threatened that if the assistant marine engineers supported and selected the MEBA as their collective bargaining representative, that Respondent would not bargain collectively with the MEBA;[16]

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[14]Respondent admits that the following individuals occupied the positions set opposite their names and are supervisors and its agents: Curtis Crooke — president; John Evans — vice president of operations; James Dean — operations manager; Tom Williams — personnel director.

[15]Based upon the credited testimony of Smith, Brookshire, Welty and Aikens. Respondent's attorney Smith, present throughout the hearing, did not deny the August 6 allegations although the testimony shows that he was present when the threats and promises were made.

[16]Based upon the credited testimony of McDonald, Ahbel and Aikens.

(3) On or about August 9, Respondent, through its agent Williams, told an employee that he should not sign anything for the MEBA;[17]

(4) On or about September 25, Respondent, through Dean, promised employees improved benefits, including pension and stock option plans if they refrained from supporting the MEBA, told employees they did not want employees to affiliate with the MEBA, and threatened employees that if they continued in Respondent's employ they must support Respondent's antiunion policy by not joining MEBA;[18]

(5) On or about October 1, Respondent, through Dean and Evans, told employees they were being terminated for their failure to support the Respondent's antiunion policy;[19]

(6) In the first week in August, Respondent, through Evans and Crooke, interrogated employees as to their reasons for supporting the MEBA, threatened them with discharge if they continued to support the MEBA, and promised them improved benefits if they refrained from supporting the MEBA;[20]

(7) On or about September 25, Respondent discharged Aikens, McDonald, Kell and Frederickson, and on or about September 1, discharged Welty, Ahbel, Peel, Smith, Adamis and Brookshire, because said employees joined or assisted MEBA;[21]

By the acts and conduct set forth in subparagraphs (1) through (6) above, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act; and by the acts and conduct set forth in subparagraph (7) above, Respondent discriminated against its employees in violation of Section 8(a)(3) and (1) of the Act.

It is clear, and I find, that Respondent engaged in the conduct set forth above in order to undermine and destroy the majority

[17]Based upon the credited testimony of Peel.

[18]Based upon the credited testimony of Frederickson, Aikens and McDonald.

[19]Based upon the credited testimony of Smith, Peel, Ahbel, Welty, Adamis and Brookshire.

[20]Based upon the credited testimony of Kell and Frederickson.

[21]Based upon the credited testimony of all 10 assistant marine engineers.

status of the MEBA in order to evade any obligation to bargain with that labor organization.

Because of the extensive and flagrant nature of the Respondent's unfair labor practices as found above, whereby it dissipated the MEBA's majority and removed any hope of a fair election pursuant to the MEBA's petition, I find it unnecessary to rule on whether or not there was a technical Section 8(a)(5) violation as the MEBA contends since, in either event, a bargaining order is appropriate. The Supreme Court has approved the issuance of a bargaining order even in the absence of a Section 8(a)(5) violation, where, as here, the unfair labor practices are "outrageous" and "pervasive" and of "such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had." *N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575, 613-614; *Lincoln Supply Co., Inc.*, 198 NLRB No. 137. But for its unlawful conduct, the Respondent would have been obliged to recognize and bargain with the MEBA. I find, therefore, that, even in the absence of an 8(a)(5) violation, a bargaining order is required to fully restore the status quo ante and to remedy the Section 8(a)(1) violations committed by the Respondent.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent as set forth in Section III, above, occurring in connection with the operations of Respondent described in Section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

It having been found that Respondent discriminatorily discharged Leonard Aikens, Robert McDonald, Henry Frederickson and Gary Kell on September 25, and Tim Welty, Robert Ahbel, Kirk Peel, John Smith, Daniel Adamis and Archie Brookshire on October 1, I shall recommend that Respondent offer them immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to seniority or any other

rights or privileges previously enjoyed by each, dismissing, if necessary, any employee hired since the date of termination of each, having less seniority. It is further recommended that Respondent make the above discriminatees whole for any loss of pay each may have suffered by reason of the discrimination against them. Said loss of pay shall be based on the earnings each would normally have earned from the date of discharge until he is offered reinstatement less the net earnings of each during such period. Said backpay shall be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289. The interest on backpay shall be computed in the manner set forth in *Isis Plumbing and Heating Co., Inc.*, 138 NLRB 716.

Having found that Respondent's extensive and flagrant unfair labor practices have dissipated the MEBA's majority and removed any hope of a fair election pursuant to the MEBA's petition, I shall recommend that it be ordered to cease and desist therefrom, and bargain collectively with the MEBA as the exclusive representative of all employees in the unit set forth above, and, if an agreement is reached, embody such understanding in a signed agreement.

It is also recommended that Respondent be ordered to make available to the Board, upon request, all payroll and other records to facilitate checking the amount of earnings due.

In view of the nature and extent of the unfair labor practices found to have been engaged in by the Respondent, which indicate its determination to interfere aggressively with its employees' rights of self-organization and its interference with the principle of collective bargaining, I shall recommend a broad cease and desist order herein.

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. The Respondent, Global Marine Development of California, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. District 1, Pacific Coast District, MEBA, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By discriminatorily discharging Leonard Aikens, Robert McDonald, Henry Frederickson and Gary Kell on September 25, and Tim Welty, Robert Ahbel, Kirk Peel, John Smith, Daniel Adamis and Archie Brookshire on October 1, Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) of the Act.

4. By promising employees improved benefits if they abandoned or refrained from supporting the MEBA, Respondent violated Section 8(a)(1) of the Act.

5. By interrogating employees regarding their reasons for supporting the MEBA, by threatening employees with discharge if they continued to support the MEBA, and by threatening that it would not bargain collectively with the MEBA if the employees selected the MEBA as the collective bargaining representative, Respondent violated Section 8(a)(1) of the Act.

6. By telling employees they should not affiliate with or sign anything for the MEBA, and that they must support Respondent's antiunion policy by not joining the MEBA, Respondent violated Section 8(a)(1) of the Act.

7. By telling employees that they were being terminated for their failure to support Respondent's antiunion policy, Respondent violated Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

9. On August 10, 1973, the MEBA was the exclusive representative for collective bargaining purposes of Respondent's employees in the unit described as follows:

> All first marine engineers, second marine engineers, third marine engineers and oilers employed by the Respondent on th Hughes Glomar Explorer, excluding office clerical employees, professional employees, guards and supervisors as defined by the Act, and further excluding all other employees of the Respondent employed on the ship.

The aforesaid unit was, and is, a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act; and any subsequent loss of such status is the

result of the Respondent's unfair labor practices heretofore found above.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[22]

ORDER

Respondent, Global Marine Development of California, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against any employee for supporting District 1, Pacific Coast District, MEBA, AFL-CIO, or any other union.

(b) Promising employees improved benefits if they abandoned or refrained from supporting the union.

(c) Interrogating employees regarding their reasons for supporting the Union, threatening employees with discharge if they continued to support the Union, and threatening that it would not bargain collectively with the Union if the employees selected the Union as their collective bargaining representative.

(d) Telling employees they should not affiliate with or sign anything for the Union, and that they must support the Respondent's antiunion policy by not joining the Union.

(e) Telling employees that they were being terminated for their failure to support Respondent's antiunion policy.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

[22]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Upon request, bargain in good faith with District 1, Pacific Coast District, MEBA, AFL-CIO as the exclusive representative of the employees in the following appropriate unit and embody in a signed agreement any understanding reached:

> All first marine engineers, second marine engineers, third marine engineers and oilers employed by the employer on the Hughes Glomar Explorer, excluding office clerical employees, professional employees, guards and supervisors as defined by the Act, and further excluding all other employees of the Respondent employed on said ship;

(b) Offer Leonard Aikens, Robert McDonald, Henry Frederickson, Gary Kell, Tim Welty, Robert Ahbel, Kirk Peel, John Smith, Daniel Adamis and Archie Brookshire immediate and full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privleges, and make said employees whole as set forth in the remedy section herein, for any loss of earnings suffered as a result of the discrimination against them.

(c) Preserve, and upon request, make available to the Board or its agents, for examination and copying all payroll records, social security payment records, timecards, personnel records and other reports, and all other records necessary to analyze and determine the amounts of backpay due these employees under the terms of this recommended order.

(d) Post at its offices in Los Angeles, California and aboard the Hughes Glomar Explorer, and all other places where notices to marine engineers are customarily posted, copies of the attached notice marked "Appendix."[23] Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's representatives, shall be posted by Respondent immediately upon receipt thereof and maintained by it for 60 consecutive days thereafter, in conspicuous places, where notices to marine engineers are customarily posted. Reasonable

[23]In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

steps shall be taken to insure that said notices are not altered defaced, or covered by any other material.

(e) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated: June 13, 1974

JAMES S. JENSON
Administrative Law Judge

APPENDIX B

in the

United States Court of Appeals

FOR THE NINTH CIRCUIT

GLOBAL MARINE DEVELOPMENT OF CALIFORNIA, INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

No. 74-3280

OPINION

Petition to Review a Decision of the National Labor Relations Board

Before: WALLACE and SNEED, Circuit Judges, and CARR,* District Judge

WALLACE, Circuit Judge:

Global Marine Development of California, Inc. (Global), seeks review of an order of the National Labor Relations Board (Board). The Board cross-applies for enforcement of its order. We affirm and enforce.

Global owns and operates the Hughes Glomar Explorer, a unique vessel designed for deep-sea mining. The crew arrangement is also somewhat distinctive. The ship has two complete crews of 100 to 200 men that alternate operating the ship, one crew being on board while the other is on leave. Each of the crews included an engine department consisting of a chief engineer, a first assistant engineer, a second assistant engineer and three third assistant engineers. All six of these men were licensed officers.

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*Honorable Charles H. Carr, Senior United States District Judge, Central District of California, sitting by designation.

Also included in each engine department were three oilers, who were non-licensed seamen.

Each assistant engineer worked a twelve-hour shift each day. His first six hours were spent in the engine control room on watch, monitoring engine room operations. Coast Guard regulations require that a licensed engineer be on watch at all times. During this time the oiler assigned to him made rounds of the engine room, also monitoring various devices. The engineer and oiler spent the last six hours of their shift on maintenance, making various repairs and improvements. Thus, four teams of one engineer and one oiler were needed to man the ship; because each crew had only three oilers, the less experienced third assistant engineers were, at times, assigned to oiler shifts.

On its maiden voyage in 1973, the Explorer was manned by the "A" crew from the shipyards in Chester, Pennsylvania, to Bermuda. There the "B" crew replaced the "A" crew and operated the ship around Cape Horn to Long Beach. Either during the time that the ship was in the shipyards or during the trip to Bermuda, all twelve of the licensed engineers signed authorization cards for the Marine Engineers Beneficial Association (Union). Thereafter, Global's anti-union activity included promises of added benefits and threats of termination. While the Explorer was still at sea with the "B" crew, engineers from the "A" crew were summoned to Global's offices in Los Angeles and terminated. The day the Explorer arrived in Long Beach, the "B" engineers were also terminated.

Unfair labor practice charges were filed against Global by the Union, alleging that Global interfered with, coerced and eventually terminated the twelve men because of their union activities, in violation of sections 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), (3). After a full hearing, the administrative law judge found that Global had committed the alleged unfair practices and that a bargaining unit consisting of engineers and oilers was appropriate. His recommended order required Global to cease and desist from such practices, to offer reinstatement to ten of the discharged engineers and, upon request, to bargain with the Union. The Board adopted the administrative law judge's findings and order. 214 NLRB No. 40 (Oct. 22, 1974).

Global's contentions which merit our attention are: (1) that the Board erred in finding that the engineers were not "supervisors" as that term is defined by section 2(11) of the Act, 29 U.S.C. § 152(11), and thus outside the protection of section 8; (2) that the Board erred in finding that the authorization cards were valid and not procured through supervisory solicitation; and (3) that a bargaining unit consisting of oilers and engineers is inappropriate.

I

Global's main line of defense is that the twelve licensed engineers were not "employees" and that therefore Global had no duty to bargain with them. Section 2(2) of the Act excludes "supervisors" from the definition of "employees" and thus from the protections of Section 8. Section 2(11) defines "supervisor" as follows:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, *if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.*

29 U.S.C. § 152(11) (emphasis added). The parties stipulated that the chief engineers were supervisors and the Board's order does not affect them. Applying the test outlined in section 2(11), the Board found that the assistant engineers were not supervisors. Global contends that this determination was error.

The Board's findings can be overturned only if they are not supported by substantial evidence from the record as a whole. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 487-91 (1951). While it has been held that the criteria set forth in section 2(11) are to be read and applied disjunctively, *Arizona Public Service Co v. NLRB,* 453 F.2d 228, 230 (9th Cir. 1971), and that the existence of the powers, not their exercise, is determinative of one's status as a supervisor, *NLRB v. Southern Seating Co.,* 468 F.2d 1345, 1347 (4th Cir. 1972), the statute nevertheless grants

the Board wide discretion in determining whether the powers are exercised routinely or require the use of independent judgment. *NLRB v. Swift & Co.,* 292 F.2d 561, 563 (1st Cir. 1961), *quoted with approval in Marine Engineers Beneficial Association v. Interlake S.S. Co.,* 370 U.S. 173, 179 n.6 (1962).

We find that the Board's findings are supported by substantial evidence in the record. The engine department personnel appear to have been under the direct supervision of the chief engineer, with only a formal but structurally unnecessary "pecking order" established internally. The chief engineer was responsible for personnel and maintenance assignments, was the final arbiter of adjustments and grievances and was consulted immediately in the event of any mechanical failure that required slowing or stopping the ship, even though a licensed engineer was on watch in the control room at the time. Functions other than that of watch engineer seem to have been interchanged frequently among the assistant engineers and oilers. While the watch engineer was technically responsible for the engine room operations during his watch, there is testimony that his powers — both extant and exercised — were routine in nature. Some disciplinary powers were also possessed by the officers, but the extent of those powers is unclear in the record; it does not appear, however, that those powers were exercised, despite some rather blatant insubordination. It is our impression that the record demonstrates that the engine department on the Explorer was unique among engine departments. In other circumstances assistant engineers might be supervisors but here we find no error in the Board's findings that the assistant engineers did not possess powers sufficient to warrant their classification as supervisors.

II

Global contends that the union authorization cards were invalid on the grounds that supervisory personnel participated in obtaining them. The only supervisors involved — the two chief engineers — attended some union meetings and signed authorization cards themselves, but the record suggests that they played only minor roles in the organization process. The type of solicitation which invalidates a union selection process is one that must "contain the seeds of potential reprisal, punishment, or intimidation

[or] the involvement of the supervisors does not rise to the level of supervisory 'solicitation.' " *NLRB v. WKRG-TV, Inc.,* 470 F.2d 1302, 1316 (5th Cir. 1973). The record supports the Board's conclusion that the chief engineers' activities did not constitute supervisory solicitation. Inasmuch as none of the other engineers was a supervisor, solicitation by the assistant engineers does not invalidate the authorization cards.

III

While it is apparent that the oilers had not sought union representation, the Board's order created a bargaining unit consisting of the ten assistant engineers and the six oilers. The determination of whether there is a sufficient community of interests between engineers and oilers to justify a collective bargaining unit composed of the two groups is a matter left to the discretion of the Board. *Packard Motor Car Co. v. NLRB,* 330 U.S. 485, 491 (1947).

The record amply supports a finding of the appropriateness of this bargaining unit The unit consists of all non-supervisory personnel in the engine department. Assistant engineers and oilers work side by side on the maintenance shifts, performing essentially identical labor. While their assignments differ somewhat on the watch shift, they have a common area of responsibility and coordinate their activities. Other than the task of standing watch, the job functions are frequently interchanged between engineers and oilers; indeed, on the voyage from Chester to Long Beach, four of the six third assistant engineers were also assigned shifts as oilers. We find no abuse of discretion in the Board's determination of an appropriate bargaining unit.

AFFIRMED AND ENFORCED

APPENDIX C

STATUTES

National Labor Relations Act

Sec. 2, 29 U.S.C. § 152. Definitions

When used in this subchapter —

* * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * *

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(12) The term "professional employee" means —

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involv-

ing the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

Sec. 8, 29 U.S.C. § 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Shipping Statutes

46 U.S.C. § 224. Licensing of officers

The Coast Guard shall license and classify the masters, chief mates, and second and third mates, if in charge of a watch, engineers, and pilots of all steam vessels, and the masters of sail vessels of over seven hundred gross tons, and all other vessels of over one hundred gross tons carrying passengers for hire. It shall be unlawful to employ any person or for any person to serve as a master, chief mate, engineer, or pilot of any steamer or as master of any sail vessel of over seven hundred gross tons or of any other vessel

of over one hundred gross tons carrying passengers for hire who is not licensed by the Coast Guard; and anyone violating this section shall be liable to a penalty of $100 for each offense.

* * * *

46 U.S.C. § 224a. Same; Officers' Competency Certificates Convention, 1936

* * * *

(3) Any license issued (whether before, or on, or after, October 29, 1939,) to a master mate, chief engineer, or assistant engineer of a vessel to which this section applies shall be deemed to be a certificate of competency for a master or skipper, navigating officer in charge of a watch, chief engineer, or engineer in charge of a watch, respectively.

(4) No person shall be engaged to perform, or shall perform on board any vessel to which this section applies, the duties of master, mate, chief engineer, or assistant engineer unless he holds a license to perform such duties, issued in accordance with the provisions of subsection 2 of this section: *Provided,* That a license as master, mate, chief engineer, or assistant engineer of vessels subject to this section may be issued without examination at any time prior to October 29, 1941, to any applicant who has had sufficient practical experience in the position for which he applies to be licensed and has no record of any serious technical error against him: *Provided further,* That no person to whom a license as master, mate, chief engineer, or assistant engineer is issued without examination may serve under authority of that license as master, mate, chief engineer, or assistant engineer on any vessel subject to the inspection laws of the United States.

(5) It shall be unlawful to engage or employ any person or for any person to serve as a master, mate, or engineer on any such vessel who is not licensed by the Coast Guard; and anyone violating this section shall be liable to a penalty of $100 for each offense.

46 U.S.C. § 672. Requirements, qualifications, and regulations as to crews — Qualifications

(a) No vessel of one hundred tons gross and upward, except those navigating rivers exclusively and the smaller inland lakes and except as provided in section 569 of this title, shall be permitted to depart from any port of the United States unless she has on board a crew not less than 75 per centum of which, in each department thereof, are able to understand any order given by the officers of such vessel, nor unless 65 per centum of her deck crew, exclusive of licensed officers and apprentices, are of a rating not less than able seamen. * * *

* * * *

Members of engine department

(e) No vessel to which this section applies may be navigated unless all of the complement in her engine department above the rating of coal passer or wiper and below the rating of licensed officer shall be holders of a certificate of service as a qualified member of the engine department. The Coast Guard shall, upon application and examination as to competence and physical condition, as prescribed by the Commandant of the Coast Guard, issue such a certificate of service. An applicant for such rating shall produce to the Coast Guard definite proof of at least six months' service at sea in a rating at least equal to that of coal passer or wiper in the engine department of vessels required by this section to have such certificated men or proof that he is a graduate of a school ship approved by and conducted under rules prescribed by the Commandant of the Coast Guard.

46 U.S.C. §701. Various offenses; penalties

Whenever any seaman who has been lawfully engaged or any apprentice to the sea service commits any of the following offenses, he shall be punished as follows:

* * * *

Fourth. For willful disobedience to any lawful command at sea, by being, at the option of the master, placed in irons until such disobedience shall cease, and upon arrival in port by forfeiture from his wages of not more than four days' pay, or, at the discretion of the court, by imprisonment for not more than one month.

Fifth. For continued willful disobedience to lawful command or continued willful neglect of duty at sea, by being, at the option of the master, placed in irons, on bread and water, with full rations every fifth day, until such disobedience shall cease, and upon arrival in port by forfeiture, for every twenty-four hours' continuance of such disobedience or neglect, of a sum of not more than twelve days' pay, or by imprisonment for not more than three months, at the discretion of the court.

Sixth. For assaulting any master, mate, pilot, engineer, or staff officer, by imprisonment for not more than two years.

APPENDIX D

ARIZONA PUBLIC SERVICE COMPANY,
Petitioner-Appellant,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent-Appellee.
No. 71-1183.

United States Court of Appeals, Ninth Circuit.
Dec. 15, 1971.

Before WRIGHT and CHOY, Circuit Judges, and BYRNE, SR., District Judge.*

FULL TEXT OF OPINION

CHOY, Circuit Judge: — I. Arizona Public Service Company (the Company) is a natural gas and electricity utility serving customers throughout Arizona. The Company's electrical system generates power at several plants, and it buys and sells electrical power pursuant to contracts with other southwestern utilities. The Company headquarters is in Phoenix, and a smaller office is maintained in Flagstaff. Since 1945, the Company has recognized the International Brotherhood of Electrical Workers, Local Union No. 387 (the Union) as the exclusive bargaining representatives of its production and maintenance employees.

In 1969, the Union sought an NLRB order directing an election among the Company's nine System Load Supervisors (Supervisors) and ten assistant System Load Supervisors (Assistants or Assistant Supervisors). The Company resisted arguing that these employees were all "supervisors" within the meaning of §2(11) of the National Labor Relations Act, 29 U.S.C. § 152(11), (the Act), and not entitled to the Act's protection. Relying on The Connecticut Light & Power Co., 121 NLRB 768, 42 LRRM 1433 (1958), the Board unanimously held that neither the Super-

*The Honorable William M. Byrne, Sr., United States District Judge, Central District of California, sitting by designation.

visors nor the Assistant Supervisors responsibly directed other employees and that, therefore, they were not §2(11) "supervisors." 182 NLRB No. 72, 74 LRRM 1180 (1970) The Board then directed an election, which the Union won. The Supervisors and Assistants were then included, in compliance with the Board's order, within the production and maintenance bargaining unit, and the Union was certified as their exclusive bargaining representative.

The Company, however, refused to bargain with the Union as the representatives of these employees. The Union petitioned for a Board order directing the Company to bargain. Although the Company contended that since the representation proceedings, it had altered and clarified the status and duties of the Supervisors and Assistant Supervisors to make them more clearly statutory "supervisors," the Board entered summary judgment for the Union, finding that the Company had engaged in unfair labor practices[1] and ordered the Company to bargain with the Union.[2] 188 NLRB No. 1, 76 LRRM, 1407 (1970) The Company again refused, and petitioned under § 10(f), 29 U.S.C. § 160(f), for review of the Board's order. The Board cross-petitioned for enforcement of its order under § 10(e), 29 U.S.C. § 160(e),[3] We deny enforcement because the employees in question are supervisors within the meaning of § 2(11).

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[1]The Company was held to have violated §§8(a)(1) and (5) 29 U.S.C. §§158(a)(1) and (15).

§§8(a) It shall be an unfair labor practice for an employer —

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

• • •

"(5) to refuse to bargain collectively with the representatives of his employees . . ."

[2]The Company has appealed the Board's summary judgment as erroneously entered because there exist disputed issues of fact. Since we find that the Board was wrong in its initial determination that the employees in question are not supervisor, we need not decide this question.

[3]The Union has been granted leave to intervene in this action. United Auto Workers, Local 283 v. Scofield, 382 U.S. 205, 60 LRRM 2479 (1965). Thus, all the parties are now before this court.

II. The National Labor Relations Act protects the self-organization and collective bargaining of "employees," which term excludes ". . . any individual employed as a supervisor." § 2(3), 29 U.S.C. § 152(3). "Supervisor" is in turn defined in § 2(11).

"(11) The term 'supervisor' means any individual having authority in the interest of the employer, *(1)* to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or *(2)* responsibly to direct them, or *(3)* effectively to recommend such action, *(4)* if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires independent judgment." (italicized numbers added)

Section 2(11) is to be read in the disjunctive, and the presence of any one of the enumerated powers is sufficient to render an employee a "supervisor." N.L.R.B. v. Fullerton Publishing Co., 283 F.2d 545, 548, 47 LRRM 2061 (9th Cir. 1960). The statute turns upon the existence of a power and not the frequency of its utilization. For example, an employee who has the power to fire and hire other employees is nonetheless a supervisor though he has never exercised that power. See Ohio Power Co. v. N.L.R.B., 176 F.2d 385, 24 LRRM 2350 (6th Cir. 1949). While the statutory tests are clear, the ultimate determination of supervisory status depends upon a close scrutiny of the job actually performed by the employees in question.[4] The Board is accorded a large measure of discretion in weighing the subtle differences between jobs, and its determination is accorded considerable judicial deference. N.L.R.B. v. Swift and Co., 292 F.2d 561, 48 LRRM 2695 (1st Cir. 1961). However, the Board's finding of fact that the employees are not supervisors is subject to the scrutiny of judicial review. Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 27 LRRM 2373 (1951). Only if we can conscientiously say that the record

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[4]Neither party has cited to us a case which is exactly like this one, and our research has revealed none. Many cases are similar and are of some guidance in determining what factors other courts have felt important in deciding the question of supervisory status. We find these cases and similar Board decisions helpful but not authoritative. See generally Daykin, "Legal Meaning of 'Supervisory' under Taft-Hartley," 13 Labor L.J. 561 (1st Cir. 1961).

considered as a whole supports the Board's finding must we affirm. Universal Camera, supra, at 488.

III. The Company does not contend that the Supervisors and Assistant Supervisors have the authority to "hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees" or the power effectively to recommend such action[5]. It does say, however, that these employees have the authority responsibly to direct other employees and such direction is not routine. We agree.

The Company's Supervisors and Assistant Supervisors have very few of the outward indicia of supervisory status.[6] A license is not reqiured for their position and the sole scholastic proficiency desired is a knowledge of mathematics. They receive on-the-job training. Although regular meetings are held to discuss the problems and procedures of the system, these are not training meetings, and neither the Supervisors nor the Assistant Supervisors attend meetings of the Company's managerial staff. They have no hand in determining Company policy.

In the abstract, it may seem that these employees perform routine functions requiring skill and ability, but do little more than supervise the use of sophisticated machines. However, the record as a whole, extending beyond static job descriptions, demonstrates that these employees have supervisory authority.

[5]The Company does contend that the Supervisors report operational errors to their immediate superiors, that these reports may result in discipline, and that these employees have the real authority to issue written warnings. However, from our view of the case, we need not decide whether these employees have the power effectively to recommend discipline.

[6]The title "Supervisor" is, of course, irrelevant to determination of the statutory status. Both Supervisors and Assistant Supervisors are subject to the same pension, hospitalization, medical, and vacation plan as other employees. They are paid twice monthly, like other employees, and receive time and a half overtime, computed on an hourly basis. None of the Company's employees punch a timeclock. Vacant Assistant Supervisor positions are filled by accepting bids from any employee within the system, but Supervisors are chosen solely from among experienced Assistant Supervisors. There is one payroll for officers and managers and another for the rest of the Company, including Supervisors and Assistants.

First, the Company considers these men supervisors. Thomas G. Woods, Jr., vice-president of management services, testified that the Supervisors had a "clear delegated authority over virtually everybody in the company." And W. P. Reilly, the Company's president, stated that the Company delegated authority to the Supervisors in System Load Dispatch ". . . to operate the system, operate it efficiently, to operate it in the best economic manner and in a safe manner . . ." Reilly said that the Supervisors exercised this power on a day-to-day basis, and other employees were instructed to comply promptly with SLD directives.

Second, the Company's other employees consider these men supervisors. Lawrence Eaglin, an area manager who is in constant contact with SLD, instructs his men to obey SLD orders and testified that they never were, in fact, disobeyed. Priority is given all SLD calls, and there is frequent direct contact between SLD and field employees. The linemen ". . . may have disagreed [with an order] but I don't know of anyone that ever disobeyed an order from SLD . . . [b]ecause they have the final say — they have the control over everything so they are the final word." One of the Supervisors testified that in his experience no one had ever failed to carry out any of his instructions or requests.

Third, and most important, the Supervisors and Assistant Supervisors responsibly direct employees in the field after business hours and during emergencies. We defined "responsibly" in N.L.R.B. v. Fullrton Publishing Co., 283 F.2d 545, 548, 47 LRRM 2061 (9th Cir. 1960), quoting with approval Ohio Power Co. v. N.L.R.B., 176 F.2d 385, 387, 24 LRRM 2350 (6th Cir. 1949).

"To be responsible is to be answerable for the discharge of a duty or obligation. Responsibility includes judgment, skill, ability, capacity, and integrity, and is implied by power."

The jobs in question require judgment, skill, ability, capacity, and integrity. The Company's electrical system is often under the sole and complete control of these employees.[7] They decide when and

[7]Practically speaking, there is no superior officer present after five in the evening, so that during the night, if these employers are not supervisors, the Company's system operates without supervision. See Pacific Intermountain Express Co. v. N.L.R.B., 412 F.2d 1, 4, 71 LRRM 2551 (8th Cir. 1969); Eastern Greyhound Lines v. N.L.R.B., 337 F.2d 84, 87, 57 LRRM 2241 (6th Cir. 1964).

how much electricity to buy or sell. They decide what priority is to be given to repair requests. They choose which linemen are to work, when and where. Field employees obey their directives. When there is no immediate threat to life or property and a superior is available, these employees will discuss a course of action with their superior. However, after hours or in emergencies, the Supervisor is authorized to and does by-pass the normal chain of command.

The Board argues that while these jobs may require skill and judgment, their operation is routine, requiring only that the employees supervise machines and relay orders to field supervisors, who then supervise the actual execution of the directive. This was the case in The Connecticut Light & Power Co., 121 NLRB 768, 42 LRRM 1433 (1958), upon which the Board relies. In general outline, the Connecticut Light load dispatchers are not unlike the Company's Load Supervisors. However, operations in the Connecticut Light utility were governed by a detailed set of rules and procedures, including state public utilities commission regulations. The Board held Connecticut Light's employees were not supervisors, a position it has generally maintained in the cases cited in the margin.[8]

On the other hand, the Company's Supervisors and Assistants are more than simple supervisors of machines. They effectively direct field operations during emergencies and after hours. The

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[8]In the field of public utilities, the Board found load supervisors or dispatchers not to be supervisors in: Baltimore Gas and Electric Co., 138 NLRB 270, 51 LRRM 1012 (1962); The Connecticut Light & Power Co., 121 NLRB 768, 42 LRRM 1433 (1958); Puget Sound Power & Light Co., 117 NLRB 1825, 40 LRRM 1097 (1957); Carbid & Carbon Chemical Co., 92 NLRB 1555, 27 LRRM 1294 (1951); Texas Electric Service Co., 77 NLRB 1258, 22 LRRM 1143 (1948); Carolina Power & Light Co., 80 NLRB 1321, 23 LRRM 1226 (1943); Rockland Light & Power Co., 72 NLRB 1117, 19 LRRM 1255 (1947); Illinois Power Co., 70 NLRB 1043, 18 LRRM 1392 (1946); Pacific Gas & Electric Co., 69 NLRB 258, 18 LRRM 1210 (1946); Virginia Electric & Power Co., 66 NLRB 271, 17 LRRM 334 (1946); Toledo Edison Co., 63 NLRB 217, 16 LRRM 304 (1945); and Cincinnati Gas & Electric Co., 57 NLRB 1298, 14 LRRM 275 (1944). Dispatchers were found to be managerial personnel in Central Maine Power Co., 151 NLRB 42, 58 LRRM 1346 (1965).

most revealing portion of the record before us is a condensed tape and transcript of approximately three hours of Supervisor operations on a Friday evening. The tape clearly documents a Supervisor exercising supervisory functions and responsibly directing linemen and servicemen. It reveals that the Supervisor's authority responsibly to direct other employees is "not weak or jejune but import[s] active vigor and potential vitality." N.L.R.B. v. Security Guard Service, Inc., 384 F.2d 143, 147 66 LRRM 2247 (5th Cir. 1967). While directing the ordinary repair operations and giving clearances for de-energized lines, testing faulty lines, and locating defects, the Supervisor, ignoring the chain of command, himself directed the vast operations necessary to return service to customers during a summer electrical storm.

The tape indicates that in an emergency — and such summer storms are frequent in Arizona — the Supervisor has the power to requisition any man on the spot and to direct his movement. He can direct substantially every man employed by the Company. See Ohio Power Co., supra. He has the authority to decide without consulting anyone whether or not a line can be de-energized, the final authority to determine the feasibility of repairs and the ability to call linemen out for overtime. Cf., West Penn Power Co. v. N.L.R.B., 337 F.2d 993, 57 LRRM 2387 (3rd Cir. 1964) (managerial personnel) They do far more than assign jobs according to a list before them or relay orders from their superiors. See N.L.R.B. v. Whitin Machine Works, 204 F.2d 883, 32 LRRM 2201 (1st Cir. 1953); Precision Fabricators, Inc. v. N.L.R.B., 204 F.2d 567, 32 LRRM 2268 (2d Cir. 1953); and cases collected in note 8 supra. The Company's Supervisors handle most emergencies on their own; they do not implement instructions from others. Compare Texas Electrical Service Co., 77 NLRB 1258, 22 LRRM 1143 (1948). Nor are there comprehensive regulations and guidelines which limit the area of individual judgment. Compare Connecticut Light, supra. Finally, the Supervisor's directions to subordinates are far more than the "necessary incidents of the application of their technical know-how." Westinghouse Electric Corp. v. N.L.R.B., 424 F.2d 1151, 1156, 74 LRRM 2070 (7th Cir. 1970).

More helpful than the utility cases on which the Board relies are cases involving bus and transportation dispatchers[9]. In these cases emphasis is placed on the supervisors' role during emergencies caused by weather, mechanical failure, and personnel problems. When he is alone in the terminal, the bus dispatcher, like the Supervisor after hours, must juggle routes, maneuver men, depart from routine operations whenever he feels it is warranted. Of necessity, the Supervisors here responsibly direct the men in the field, sometimes routing directives through nominal superiors. The effective exercise of authority is nonetheless supervisory though it is passed on through another supervisory employee. Eastern Greyhound Lines v. N.L.R.B., 337 F.2d 84, 87, 57 LRRM 2241 (6th Cir. 1964) Nor is it less supervisory power because it is couched in non-demanding terms.[10]

Accordingly, the Board's Decision and Order as supplemented is reversed.

DISSENTING OPINION

BYRNE, District Judge, Dissenting: — I respectfully dissent.

The unfair labor practice is practically conceded. The Company admits it refused to bargain with the Union solely on the ground that it disagreed with the Board's conclusion that the System Load Supervisors and Assistant System Load Supervisors are not supervisors within the meaning of Section 2(11).

The Supreme Court has cautioned us that in construing the meaning of Section 2(11), we should look to the Board's "special function of applying the general provisions of the Act to the complexities of industrial life." (N.L.R.B. v. Erie Resistor Corp., 373 U.S. 221, 53 LRRM 2121 (1963)) and that courts owe "deference to Board expertise in applying statutory terms to particular facts" Hanna Mining Co. v. Marine Engineers, 382 U.S. 181, 190, 60 LRRM 2473 (1965).

Where, as in the instant case, substantial evidence on the record as a whole supports the Board's findings, this court should not substitute its opinion for that of the Board.

[9]See, e.g., Pacific Intermountain Express, supra; Eastern Greyhound, supra; New York City Omnibus Corp., 104 NLRB 579, 32 LRRM 1179 (1953).

[10]Since the Assistant Load Supervisors also pledge the Company's credit in executing contracts for the sale and purchase of power with other utilities, they are statutory supervisors for this reason also. Cf. Central Maine Power Co., 151 NLRB 42, 58 LRRM 1346 (1965).

APPENDIX E

This Agreement made this 5th day of December, 1972 by and between GLOBAL MARINE INC., a Corporation chartered and existing under the laws of the State of Delaware (which with its subsidiary and affiliated corporations, is hereinafter called the "Contractor") and HUGHES TOOL COMPANY, a Corporation chartered and existing under the laws of the State of Delaware (hereinafter called the "Agent") and the United States Government (hereinafter called the "Sponsor").

* * * *

Section 2 — *Tasks and Roles of Responsibility*

* * * *

2.2 *Agent*

Agent shall act as the undisclosed Agent for the Sponsor. The Agent shall represent itself to be the owner and operator of the Deep Sea Mining Project and as agreed to with the Sponsor has entered into the definitive Deep Sea Mining Agreement with the Contractor effective 1 January 1971 (DSMA).

* * * *

b. Provide support as necessary to keep Sponsor from being identified as the true party in interest in the Program.

* * * *

Section 8 — *Special Security Restrictions*

It is emphasized that neither Contractor nor Agent shall reveal (i) the specific nature of any of the details of the work being performed hereunder or (ii) any information whatsoever with respect to the Government's sponsorship of this contract, the department involved, or the work thereunder except as Agent or Contractor is directed, in writing or permitted to reveal such information by the Contracting Officer or by his duly authorized representative for security matters; and notwithstanding any clause or section of this Agreement to the contrary neither Agent nor Contractor shall interpret any provisions of this Agreement as requiring or permitting divulgence of such information to any person, public or private, or to any officer or department of the Government without the express consent of the Contracting Officer or his duly authorized representative for security matters.

In the execution of this contract by Agent and Contractor, they shall be governed by security instructions furnished by the Security Representative of the Contracting Officer.

APPENDIX F

In The

UNITED STATES DISTRICT COURT

For The District of Columbia

MILITARY AUDIT PROJECT
1065-31st Street, NW
Washington, D.C. 20007
(202) 337-6065

FELICE D. COHEN
1933-47th Street, NW
Washington, D.C. 20007
(202) 337-8753

MORTON H. HALPERIN
8215 Stone Terrace Drive
Bethesda, Maryland 20016
(301) 469-7818

Plaintiffs,

vs.

WILLIAM E. COLBY
Director of Central Intelligence
Washington, D.C. 20505
(703) 351-1100

CENTRAL INTELLIGENCE AGENCY
Washington, D.C. 20505
(703) 351-1100

DEPARTMENT OF DEFENSE
Washington, D.C. 20301
(703) 545-6700

Defendants.

Civil Action No. 75-2103

AFFIDAVIT

Brent Scowcroft, Assistant to the President for National Security Affairs, being first duly sworn, deposes and says:

1. I was duly appointed by the President as Assistant to the President for National Security Affairs on November 20, 1975, and I continue to serve in that position. From April 6, 1973 to

November 20, 1975 I occupied the position as Deputy Assistant to the President for National Security Affairs.

2. I have read and I am familiar with the contents of the complaint in the captioned case, and I make the following statements based on personal knowledge which was obtained by me in my official capacity as Assistant to the President for National Security Affairs and in my prior capacity as Deputy Assistant to the President for National Security Affairs. In the course of my duties I have been aware of or involved in the deliberations and decisions of National Security Council bodies as they relate to the facts set forth herein.

3. In a document, dated October 20, 1969, classified Top Secret, Executive Branch approval was given to the establishment of a classified United States Government program to accomplish certain secret tasks in furtherance of national security objectives of the United States. A committee of the National Security Council (NSC) chaired by the Assistant to the President for National Security Affairs was assigned supervision of the program. The program included the design, construction, operation, and use of a ship which came to be known as the HUGHES GLOMAR EXPLORER. United States Government documents produced in the course of executing the program were classified Top Secret or Secret pursuant to procedures and criteria of Executive Orders 10501 and 11652 based on determinations that disclosure of information concerning the program could cause exceptionally grave or serious damage to the national security for the reasons set forth in this affidavit.

4. From the outset of the Program it was recognized that the revelation of the very existence of the Program and, specifically, the fact that the United States was the sponsor of the activity involving the HUGHES GLOMAR EXPLORER could provoke a foreign power to take countermeasures which would render the Program incapable of execution. Accordingly, it was decided that the United States Government should make arrangements with private corporations to provide a commercial base for the HUGHES GLOMAR EXPLORER undertaking. After several alternatives were considered, arrangements were made with the Hughes Tool Company to act as agent of the United States to

sponsor the undertaking. This agreement evolved into a formal contractual relationship wherein the Hughes Tool Company and thereafter the Summa Corporation, its successor organization, undertook to carry out certain functions on behalf of the United States including holding bare record title to the HUGHES GLOMAR EXPLORER.

5. All records of contracts and related documents, which are held by the United States Government concerning the arrangement described in the previous paragraph, are classified Top Secret and/or Secret. These documents detail the methods used to implement and execute this Program, to establish the commercial relationship to the undertaking and to disassociate the United States from sponsorship of the activity. Additionally, these records describe in detail the equipment with which the HUGHES GLOMAR EXPLORER was outfitted. Disclosure of information relative to the equipment would reveal the precise nature and purpose of the Program.

6. For reasons unrelated to this case a committee of the NSC determined on 8 August 1975 that it had become necessary for the United States to acknowledge ownership of the HUGHES GLOMAR EXPLORER and to declassify certain portions of its contract with Summa Corporation and Global Marine, Inc. The NSC Committee directed that "no further facts" would be declassified and specifically directed that the fact of the involvement in the Program of any given United States Government Agency should not be disclosed. The Committee noted further ". . . a firm line would be drawn between the fact of Federal ownership and other matters relating to the Project." Those portions of documents which relate to the United States ownership and evidence the United States contractual relationship with Hughes Tool Corporation, Summa Corporation and Global Marine, Inc. have been declassified pursuant to the NSC Committee decision and have been made public in court proceedings in California. (*United States v. County of Los Angeles,* Civil Action Number 75-2752-R, U.S.D.C. Central District of California.)

7. The release of the United States of additional details relating to the HUGHES GLOMAR EXPLORER could reasonably be expected to disrupt the conduct of foreign relations vitally

affecting our national security. Official acknowledgment of the involvement of specific United States Government agencies would disclose the nature and purpose of the Program and could, in my judgment, severely damage the foreign relations and the national defense of the United States. Without revealing classified information, it is not possible to set forth the precise facts which form the basis for this judgment. I am confident, however, that such damage would occur.

8. While a great deal of speculation concerning the activities of the HUGHES GLOMAR EXPLORER and the involvement of United States Government agencies therein has appeared in the public media, there has been no official comment on the truth or accuracy of these press reports. This manner of handling sensitive matters is vital to the conduct of relations among nations.

9. While it is known and accepted that nations engage in secret activities, designed to promote their foreign and national defense policy interests, traditionally, and for sound practical reasons in the conduct of foreign affairs, governments do not officially acknowledge that they engage in such activities. In this context all nations are aware that they may be the objects of such operations and may even unofficially acknowledge this fact. No government, however, could tolerate the official acknowledgement by another government that such an operation has been conducted against it. When such official acknowledgement occurs, the nation that has been the object of such an operation must take some action in response. The nature of the retaliatory action taken by the offended nation will vary in proportion to the perceived offense. Depending on the nature and magnitude of the activity acknowledged, the offended nation may take strong measures.

10. Foreign countries who believe they would benefit by demeaning the United States would be able to use information about this Program to castigate the United States in an international forum. Fabrications or suggestions concerning our activities, which the United States would be unable to disprove, could be expected to develop from the disclosure of relatively limited information. The information sought in this case could be used as circumstantial evidence to substantiate false charges of United

States interference in the affairs of other countries. This in turn could raise suspicions about and possibly endanger United States military and diplomatic personnel and businessmen overseas.

11. Release of documents which detail the ways in which individuals and organizations have cooperated with the United States could also be expected to make it more difficult in the future to find persons and organizations willing to assist the United States Government by providing ostensible sponsorship for activities which require such measures. If this were to occur, it would impact adversely on our ability to advance policy objectives required in the support of national defense.

/s/ BRENT SCOWCROFT

Brent Scowcroft
Assistant to the President for National Security Affairs

Subscribed and sworn to before me this 19th day of March, 1976.

/s/ SAMMIE L. NEWMAN

Notary Public

My commission expires March 20, 1980.

APPENDIX G

In The

UNITED STATES DISTRICT COURT

For The District of Columbia

MILITARY AUDIT PROJECT
1065-31st Street, NW
Washington, D.C. 20007
(202) 337-6065

FELICE D. COHEN
1933-47th Street, NW
Washington, D.C. 20007
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MORTON H. HALPERIN
8215 Stone Terrace Drive
Bethesda, Maryland 20016
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Plaintiffs,

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WILLIAM E. COLBY
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Washington, D.C. 20505
(703) 351-1100

DEPARTMENT OF DEFENSE
Washington, D.C. 20301
(703) 545-6700

Defendants.

Civil Action No. 75-2103

AFFIDAVIT

Lawrence S. Eagleburger, Deputy Under Secretary for Management of the Department of State, being first duly sworn, deposes and says:

1. I was duly appointed as Deputy Under Secretary for Management of the Department of State on May 14, 1975.

2. I am familiar with the contents of the complaint in this case and make the following statement based upon personal knowledge obtained by me in my official capacity.

3. I am familiar with the facts and circumstances surrounding this case and can affirm that the information relevant to the United States Government case has been classified pursuant to Executive Order 11652, 3 C.F.R., Executive Order 11652 (1974 edition) on the ground that public disclosure would damage the national security, including the foreign relations of the United States.

/s/ LAWRENCE S. EAGLEBURGER

Lawrence S. Eagleburger
Deputy Under Secretary for Management

Subscribed and sworn to before me this 16 day of January, 1976.

/s/

Notary Public

My commission expires September 29, 1976.

No. 75-1598

In the Supreme Court of the United States

OCTOBER TERM, 1975

GLOBAL MARINE DEVELOPMENT OF CALIFORNIA, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
WILLIAM M. BERNSTEIN,
Attorneys,
National Labor Relations Board,
Washington, D.C. 20570.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B5) is reported at 528 F. 2d 92. The decision and order of the National Labor Relations Board (Pet. App. A1-A30) are reported at 214 NLRB No. 40.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1975, and the company's petition for rehearing with a suggestion for rehearing *en banc* was denied on February 4, 1976. The petition for a writ of certiorari was filed on May 3, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that assistant engineers employed on the company's ship were employees rather than supervisors, and thus protected by the National Labor Relations Act from discharge for union activity.

2. Whether the Board properly found that the union authorization cards signed by the assistant engineers were not invalid because of supervisory solicitation.

3. Whether the Board abused its discretion to establish bargaining units in concluding that a unit consisting of engineers and oilers is appropriate.

STATUTE INVOLVED

In addition to the provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), set forth at Pet. App. C1-C2, the following provisions are relevant:

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * * .

* * * * *

Section 8(a)(3). It shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * * .

* * * * *

Section 9(b). The Board shall decide in each case, whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof * * * .

STATEMENT

A. The Board's Findings of Fact

1. Petitioner Company operates the Hughes Glomar Explorer, a large deep-sea exploration vessel. On its maiden voyage in 1973, the vessel's engine department was divided into two separate crews, the A crew and the B crew, each of which served on one leg of the voyage while the other remained at home. Each engine crew consisted of a chief engineer (an acknowledged supervisor), five assistant engineers, and three oilers. (Pet. App. A5-A7.)

Each assistant engineer worked a continuous 12-hour shift each day, which was divided into a 6-hour "watch" shift and a 6-hour "maintenance" shift. The watch shift was spent in the control room; the maintenance shift which followed, in the engine room.[1] An oiler was also assigned to each of the shifts. Thus, four teams, each consisting of one engineer and one oiler,[2] were needed to man the ship's engine department. (Pet. App. A7-A8).

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[1]Since Coast Guard regulations required that a licensed engineer be on watch at all times, when one was in the engine room another was on duty in the control room (Pet. App. A7-A8).

[2]As there were only three oilers on each crew, an assistant engineer performed the duties of the fourth oiler (Pet. App. A8, n. 7).

All of the assistant engineers (five on each crew or a total of 10), whose testimony was not rebutted (Pet. App. A10, n. 9), testified that they had never exercised, or been told that they had, the authority to hire, discharge, discipline, or reprimand the oilers or any other employees; to grant time off, leave, raises, or authorize overtime; or effectively to recommend any of those actions. They did not prepare evaluations, attend staff meetings, or interview prospective employees. The chief engineer alone exercised the final authority with respect to assignments and transfers. (Pet. App. A9-A14.)

On watch shift, virtually all the work performed by the assistant engineer was routine and involved no direction or supervision over the watch shift oiler. The watch engineer spent his time in the control room monitoring various indicators, regulating generators, and making entries in the control room log. The oiler, meanwhile, spent up to five hours of this shift away from the control room making rounds and taking readings, some of which were given to the assistant engineer. In the event of a mechanical malfunction, the watch engineer would ask the engineer on maintenance shift to investigate. If the problem was minor, the maintenance engineer and oiler would try to correct it, but major problems were immediately reported to the chief engineer. (Pet. App. A8, A10.)

On maintenance shift, each assistant engineer was responsible for certain equipment assigned to him by the chief engineer; he performed maintenance on this equipment, completed the necessary unfinished maintenance work of the previous shift, and performed other routine manual work such as painting, sweeping, and cleaning. The oiler on maintenance shift performed similar tasks, working with the assistant engineer. The

chief engineer determined which maintenance jobs required special attention or were to be accorded priority, and passed his instructions on to the maintenance engineer and oiler (Pet. App. A9).

2. In May and June 1973, prior to the initial cruise of the vessel, several meetings took place between representatives of District 1, Pacific Coast District, MEBA, AFL-CIO (the Union), and various of the ship's assistant engineers. Chief Engineers Anthony and Stackhouse attended two of these meetings and signed union authorization cards, but did not solicit signatures from the assistant engineers or otherwise attempt to influence them to sign. By August 10, all 10 assistant engineers had signed union authorization cards. (Pet. App. A17-A20.)

The Company refused the Union's request for recognition based on authorization cards, and, on three occasions in August 1973, interrogated the assistant engineers regarding the Union, threatened to discharge them if they supported the Union, and promised improved benefits if they would abandon the Union. On September 25 and October 1, 1973, when this campaign failed, all 10 assistant engineers were discharged because they continued to support the Union (Pet. App. A21, A23-A24).

B. The Board's Decision and Order

The Board, adopting the decision of the Administrative Law Judge, found, contrary to the Company's contention, that the assistant engineers were employees, rather than supervisors, and that therefore they were protected by the Act from discharge for union activity (Pet. App. A16, A24). Analyzing the actual responsibilities of the engineers, the Board disagreed with the Company that the assistant engineers directed the work of other employees or had significant disciplinary authority over

them (Pet. App. A9-A16). The Board also rejected the Company's assertion that, without reference to their actual duties, "the powers and authority conferred by law on the * * * assistant engineers by reason of their being licensed by the United States Coast Guard is sufficient to classify them" as statutory supervisors (Pet. App. A15).

The Board further found that the assistant engineers and the oilers comprised an appropriate unit for purposes of collective bargaining (Pet. App. A20-A23). It found that the assistant engineers were not professional employees,[3] and that the "community of interest" which they shared with the oilers was sufficient to group them together even if the former were technical employees (Pet. App. A21-A22). Thus, the Board pointed out that (Pet. App. A22):

> The assistant engineers and oilers comprise all of the nonsupervisory employees in the engine department, they work side by side, each assisting the other, and are subject to the same supervision. * * * [T]he oilers and assistant engineers possess many of the same job skills and there is a constant interchange of job functions among some of the oilers and assistant engineers. Except for the period the watch engineer is on duty in the control room, the working conditions of the oilers and assistant engineers are similar, since they work together in the engineroom and related spaces.

[3]In rejecting petitioner's contention to the contrary, the Board noted (Pet. App. A21): "It is clear from the record that the work performed by the assistant engineers, working either as watch engineers, maintenance engineers or oilers, is not 'predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work; (ii) involving the constant exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning . . . , as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes . . . .' [29 U.S.C. 152(12)(a)] nor was it shown that the chief engineers are professional persons so that working under their supervision would qualify the assistant engineers to become professional employees."

The Board added that, "[a]lthough the [Union] did not request recognition in a unit including the oilers, it is willing to represent them along with the assistant engineers" (*ibid.*).

Accordingly, the Board concluded that in several respects, including the discharge of the assistant engineers for their union activity, the Company had violated Section 8(a)(1) and (3) of the Act (Pet. App. A27). It ordered the Company, *inter alia*, to reinstate with backpay the discharged assistant engineers and to bargain with the Union upon request[4] (Pet. App. A29).

C. The Court of Appeals' Decision

The court of appeals upheld the Board's decision and enforced its order (Pet. App. B1-B5). The court

[4]In issuing a bargaining order, the Board found that the Company's "extensive and flagrant" unfair labor practices precluded any possibility that a fair representation election could be held (Pet. App. A25). The Board rejected the Company's contention that the Union's showing of majority support through authorization cards was tainted by participation in the Union's campaign of the two chief engineers. The Board found that, although the chief engineers did sign authorization cards, they did not participate actively in the campaign and exerted no pressure on the assistant engineers to sign cards (Pet. App. A17-A19).

found the Board's findings of nonsupervisory status to be supported by "substantial evidence" (Pet. App. B4). It pointed out that, "[i]n other circumstances assistant engineers might be supervisors but here we find no error in the Board's findings that the assistant engineers did not possess powers sufficient to warrant their classification as supervisors" (*ibid.*). The court also held that "[t]he record amply supports a finding of the appropriateness of this bargaining unit" (Pet. App. B5).

ARGUMENT

Petitioner in essence challenges the substantiality of the evidence supporting the Board's findings that the assistant engineers were not supervisors, that the oilers and the assistant engineers shared a sufficient community of interest to constitute an appropriate bargaining unit, and that the Union possessed valid authorization cards from a majority of the employees. These issues turn on their particular facts and raise no issue warranting further review by this Court.[5] In the instant case, both the Board (Pet. App. A15-A16 and n. 13) and the court below (Pet. App. B4) noted that in many situations assistant engineers are considered to be supervisors under the Act, but that the engineers in this case possessed none of the indicia of supervisory authority specified in Section 2(11) of the Act, 29 U.S.C. 152(11) (Pet. App. C1).

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[5]The Company's contention (Pet. 12-17) that licensed marine engineers are supervisors *per se* by virtue of maritime law was properly rejected by the Board, since Section 2(11) of the Act, 29 U.S.C. 152(11), establishes the exclusive criteria for determining whether such engineers are supervisors for purposes of the National Labor Relations Act. See *Graham Transportation Co.*, 124 NLRB 960, 962; *Midwest Towing Co.*, 151 NLRB 658, 659; *Globe Steamship Co.*, 85 NLRB 475, 479.

Contrary to the Company's contention (Pet. 13-14), *Southern Steamship Co.* v. *National Labor Relations Board*, 316 U.S. 31, *Rees* v. *United States*, 95 F. 2d 784 (C.A. 4), and *Peninsular & Occidental Steamship Co.* v. *National Labor Relations Board*, 98 F. 2d 411 (C.A. 5), do not support the proposition that the maritime laws override the provisions of the National Labor Relations Act. These cases merely hold that the statutory right to strike does not give employees aboard ship the right to defy the authority of the vessel's captain and officers in a manner violative of federal statutes prohibiting revolt or mutiny on shipboard. No such conduct occurred here.[6]

---

[6]There is no merit to the Company's assertion (Pet. 11) that the Law Judge "did not consider the engineer officers individually by their respective positions in the ship's organization * * * [but rather] simply generalize[d] about the officers as a group * * *." The Law Judge gave detailed reasons for his rejection of the Company's arguments concerning the supervisory status of individual engineers (Pet. App. A10-A15).

Petitioner's further contention (Pet. 25-27) that governmentally imposed requirements of secrecy denied it an opportunity fairly to litigate its case before the Board is not properly before this Court. Petitioner failed to raise that issue in the court of appeals, although the true nature of the Company's mission was disclosed prior to enforcement proceedings in that court. Petitioner is thus foreclosed from raising that issue now. *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16; *Neely* v. *Eby Construction Co.*, 386 U.S. 317, 330. In any event, petitioner has not shown in what respects, if any, its witnesses would have adduced evidence contrary to that already in the record.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
WILLIAM M. BERNSTEIN,
Attorneys,
National Labor Relations Board.

JULY 1976.

DOJ-1976-07

IN THE

Supreme Court of the United States

No. 75-1598

GLOBAL MARINE DEVELOPMENT OF CALIFORNIA, INC.,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent,

—and—

DISTRICT NO. 1—PACIFIC COAST DISTRICT, MEBA, AFL-CIO,

Intervenor.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR INTERVENOR IN OPPOSITION

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Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent,

—and—

DISTRICT NO. 1—PACIFIC COAST DISTRICT, MEBA, AFL-CIO,

Intervenor.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR INTERVENOR IN OPPOSITION

Opinions Below

The Opinion of the Court of Appeals for the 9th Circuit is reported at 528 F. 2d 92 (9th Cir. 1975). The Decision and Order of the National Labor Relations Board which adopted the Findings of Fact and Conclusions of Law of the Administrative Law Judge and adopted that Judge's Recommended Order is reported at 214 NLRB No. 40 (1974).

Jurisdiction

The jurisdiction of the National Labor Relations Board in this matter was invoked under 29 U. S. C. Section 160. The jurisdiction of the Court of Appeals was properly invoked under 29 U. S. C. Section 160(f). The jurisdiction of this Court to review the Judgment of the United States Court of Appeals for the 9th Circuit was invoked under 28 U. S. C. Section 1254(1).

Questions Presented

I.

Whether there is substantial evidence on the record as a whole to support the finding of the National Labor Relations Board, as affirmed by the Court of Appeals, that the ten (10) licensed marine engineers who were discriminatorily discharged by Petitioner are "employees" within the meaning of the National Labor Relations Act, as amended.

II.

Whether the National Labor Relations Board abused its wide discretion in finding as an appropriate unit, a unit comprised of all Assistant Engineers and oilers employed by the Petitioner on the Hughes Glomar Explorer. The Court of Appeals found no abuse of discretion.

III.

Whether the National Labor Relations Board properly found, as affirmed by the Court of Appeals, that the Union authorization cards signed by the Assistant Engineers were not invalid because of alleged supervisory solicitation.

IN THE

Supreme Court of the United States

No. .....

GLOBAL MARINE DEVELOPMENT OF CALIFORNIA, INC.,

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—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent,

—and—

DISTRICT NO. 1—PACIFIC COAST DISTRICT, MEBA, AFL-CIO,

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IV.

Whether the National Labor Relations Board or the Court of Appeals denied the Petitioner its rights to due process under the Constitution of the United States, the National Labor Relations Board Rules and Regulations and provisions of the Administrative Procedure Act, 5 U.S.C. Section 551, *et seq.*, by relying on the record developed before the Administrative Law Judge in the face of Petitioner's considered decision not to produce witnesses of its own because of alleged national security considerations necessitating secrecy restraints at the time of trial.

Federal Statutes Involved

The relevant federal statutes involved are the provisions of the National Labor Relations Act, as amended, 29 U. S. C. Section 151, *et seq.*

Statement of the Case

A. *Nature of the Case*

This case is before the Court as the result of the filing by Petitioner, Global Marine Development of California, Inc. (hereinafter "Global"), of a Petition for a Writ of Certiorari to the United States Court of Appeals for the 9th Circuit pursuant to 28 U. S. C. Section 1254(1). The Petition for a Writ of Certiorari seeks review by this Court of an Order of the United States Court of Appeals for the 9th Circuit which adopted the Order of the National Labor Relations Board reported at 214 NLRB No. 40 (Appendix A-1 through A-30) following the issuance of its Opinion on December 5, 1975 (Appendix B-1 through B-5).

B. *The Facts*

Global operates the Hughes Glomar Explorer, a unique vessel designed for deep-sea mining. The crew arrangement is also somewhat distinctive. The ship has two complete crews of 100 to 200 men that alternate operating the ship and the equipment on it, one crew being on board while the other is on leave. Each of the crews included an engine department consisting of a chief engineer, a first assistant engineer, a second assistant engineer and three third assistant engineers. All six of these men were licensed officers. Also included in each engine department were three oilers, who were unlicensed seamen.

Each assistant engineer worked a twelve-hour shift each day. His first six hours were spent in the engine control room on watch, monitoring engine room operations. Coast Guard regulations require that a licensed engineer be on watch at all times. During this time the oiler assigned to him made rounds of the engine room, also monitoring various devices. The engineer and oiler spent the last six hours of their shift on maintenance, making various repairs and improvements. Thus, four teams of one engineer and one oiler were needed to man the ship; because each crew had only three oilers, the less experienced third assistant engineers were, at times, assigned to oiler shifts.

On its maiden voyage in 1973, the Explorer was manned by the "A" crew from the shipyard in Chester, Pennsylvania, to Bermuda. There the "B" crew replaced the "A" crew and operated the ship around Cape Horn to Long Beach. Either during the time that the ship was in the shipyard or during the trip to Bermuda, all twelve of the licensed engineers signed authorization cards for the

Marine Engineers Beneficial Association (Union). Thereafter, Global's anti-union activity included promises of added benefits and threats of termination. While the Explorer was still at sea with the "B" crew, engineers from the "A" crew were summoned to Global's offices in Los Angeles and given the choice of giving up the Union or being terminated. The day the Explorer arrived in Long Beach, the "B" engineers were also given the same option. All the engineers opted to continue their Union affiliation and they were all summarily discharged.

Unfair labor practice charges were filed against Global by the Union, alleging that Global interfered with, coerced and eventually terminated the twelve men because of their union activities, in violation of section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. §158(a)(1), (3). After a full hearing, the Administrative Law Judge found that Global had committed the alleged unfair practices and that a bargaining unit consisting of engineers and oilers was appropriate. His recommended order required Global to cease and desist from such practices, to offer reinstatement to ten of the discharged engineers and, upon request, to bargain with the Union. The Board adopted the Administrative Law Judge's findings and order. 214 NLRB No. 40 (Oct. 22, 1974). The Court of Appeals granted enforcement of the Board's Order.

In its Petition for Certiorari Global has contended that the Court of Appeals and the National Labor Relations Board erred by finding that the marine engineers employed by Global were "employees" rather than "supervisors" within the meaning of 29 U.S.C. Section 152(11) (Petition pp. 13 through 21); even if the engineer officers were not supervisory they were professional employees who should

not have been included in a bargaining unit employed by Global (Petition pp. 22-23); that any possible Union majority resulted from illegal supervisory, coercion and interference (Petition pp. 23-25); and that Petitioner was denied its Constitutional and statutory rights to a fair judicial and administrative review. (Petition pp. 25-27.)

All but the last of these contentions have been rejected by the Administrative Law Judge who presided at the trial of the unfair labor practice complaint issued in this matter, as well as by the National Labor Relations Board and the United States Court of Appeals for the 9th Circuit.

As to the last contention which has now been raised for the first time by the Petitioner in the Writ of Certiorari, the Petitioner makes no attempt to delineate the manner in which it would have developed the record differently had it been able to adduce evidence on its own; assuming there was evidence of this nature to be adduced.

ARGUMENT

I.

The decision below is clearly correct.

The issues that the Petitioner seeks to pursue for consideration and possible review by this Court are of the type which have traditionally been resolved by triers of fact rather than appellate courts and certainly not by this Court.

No amount of elaborate argument can convert these issues from their normal resting place in adjudication be-

fore an administrative trial and appellate body, rather than in an appellate court, and certainly not in the Supreme Court of the United States.

With respect to the finding of non-supervisory status of the marine engineers involved herein, the Court of Appeals correctly recognized that the findings of the Board on this question could only be overturned if they were not supported by substantial evidence from the record as a whole. *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 487 (1951).

The Court of Appeals emphasized that the existence of the supervisory powers in 29 U.S.C. Section 152 (11) and not their exercise was determinative of one's status as a supervisor. (Appendix B-3). In upholding the Board's findings on the question of supervisory status of the marine engineers in Global, the Court of Appeals found that the Board's findings on this issue were supported by substantial evidence on the record. (Appendix B-4).

This Court has cited with approval the decision of the United States Court of Appeals for the 5th Circuit in *NLRB* v. *Swift and Co.,* 292 F. 2d 561, 563 (5th Cir. 1961) which emphasized that the determination of supervisory status with respect to the gradations of authority responsibly to direct the work of others are so infinite and subtle that a large measure of informed discretion is involved in the exercise by the Board of its primary function to determine those who as a practical matter fall within the statutory definition of a supervisor. *MEBA* v. *Interlake Steamship Co.,* 370 U.S. 173, 179, fn. 6 (1962).

In this case the Board has amply fulfilled its function and properly exercised its discretion in finding that the

marine engineers involved herein are "employees" rather than "supervisors" within the meaning of the National Labor Relations Act 29 U.S.C. Section 152 (3) and 29 U.S.C. Section 152 (11).

A similar result must obtain with regard to the unit determination of the Board, as approved by the 9th Circuit. The unit deemed an appropriate unit includes engineer officers in a bargaining unit with oilers. The Court of Appeals noted in this regard that:

> "The determination of whether there is a sufficient community of interests between engineers and oilers to justify a collective bargaining unit based on two groups is a matter left to the discretion of the board." *Packard Motor Car Corp.* v. *NLRB,* 330 U.S. 485, 491 (1947). (Appendix B-5).

The Court of Appeals found that the record below amply supported the Board's finding of the appropriateness of the Board's bargaining unit. In *South Prairie Construction Co. Local 627, International Union of Operating Engineers, ALF-CIO, et al.,* —— U.S. ——, 92 LRRM 2507, 2508, 2509 (1976) this Court has recently reiterated that:

> ". . . the selection of an appropriate bargaining unit lies largely within the discretion of the Board, whose decision, 'if not final, is rarely to be disturbed.' *Packard Motor Co.* v. *NLRB,* 330 U.S. 485, 491."

The Petitioner has advanced no valid ground which would warrant a reexamination by this Court of the appropriateness of the unit as determined by the NLRB in this matter.

The same deference that should be given to the National Labor Relations Board finding on the questions of unit and

supervisory status should also be accorded to the Board's determination on the question of alleged supervisory coercion of the Union authorization cards. As the Court of Appeals noted (Appendix B-4, B-5) the record supports the Board's conclusion that the Chief Engineers' activities did not involve supervisory solicitation. In order for solicitation to invalidate a Union selection process such solicitation must:

> "contain the seeds of potential reprisal, punishment or intimidation (or) the involvement of the supervisors does not rise to the level of supervisory solicitation. *NLRB* v. *WKRG-TB Inc.,* 420 F.2d 1302, 1316 (5th Cir. 1973)." (Appendix B-5)

Congress has mandated that:

> ". . . the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive." 29 U.S.C. Section 160(f).

There is ample substantial evidence on the record considered as a whole which should preclude further consideration of this matter by this Court. (Appendix B-5).

Finally, the Petitioner argues for the first time in its Petition to this Court that it was denied its constitutional and statutory rights to a fair judicial and administrative review because of the alleged refusal of the National Labor Relations Board and the Court of Appeals to give consideration to cross-examination testimony in the face of an admitted failure by the Petitioner to rest its case without producing a witness in its own behalf. (Petition, pgs. 25 and 26.)

Such contentions completely belie the actual facts in several respects. First, there is no indication whatsoever that the Court of Appeals did other than review the record as a whole in affirming and enforcing the National Labor Relations Board in this matter. (Appendix B-1 through B-5). Secondly, it must be emphasized that the Administrative Law Judge and the Board itself clearly based their findings of fact, conclusions of law and order "upon the entire record in the case, . . ." including cross-examination testimony. (Appendix A-5; A-1; A-2) Thus, Petitioner's contention in this regard is without merit.

Petitioner would also have this Court disregard its long standing policy of declining to consider issues raised by the way of Petitions for Certiorari which were not raised in the Court of Appeals or before the Board when such issues could have been raised. *Lawn* v. *U.S.*, 339 U.S. 362, n.16 (1958); *Neely* v. *Martin K. Eby Construction Company*, 386 U.S. 317, 330 (1967).

Finally, Petitioner glosses over the fact that the true nature of its security regulated mission was disclosed prior to initiation of enforcement proceedings in the U.S. Court of Appeals for the Ninth Circuit. Thus, while Petitioner had ample time to advance its claim of denial of due process or request remand in the Ninth Circuit, Petitioner failed to do so. See Newsweek, March 31, 1975, pp. 24-32; The New York Times, April 27, 1975, p. 43; Appendix B-1 through B-5.

Petitioner has simply not shown in what respect, if any, its witnesses would have adduced evidence contrary to that in the record which supported the findings, conclusions and order of the Administrative Law Judge, the National Labor Relations Board and the United States Court of Appeals

for the Ninth Circuit. Petitioner has simply not demonstrated the denial of due process it alleges, nor has Petitioner shown the need for a remand which it has untimely raised at this juncture.

For the reasons set forth above, the decision of the Administrative Law Judge, as affirmed by the National Labor Relations Board and further affirmed and enforced by the United States Court of Appeals for the Ninth Circuit should be deemed correct and in need of no further consideration by this Court.

II.

There is no conflict of decision.

Petitioner has advanced no contention that there is a conflict in decisions between any United States Court of Appeals or the administrative agency involved and a Court of Appeals or any United States District Court on the issues involved herein.

Therefore, there is no basis for granting the Petition for Certiorari since there is no conflict of decisions on any of the issues raised herein.

III.

There is no important question of Federal law.

Petitioner urges that even in the absence of an incorrect decision below, as well as the absence of a lack of conflict of decisions on the issues raised herein in the Circuits, there is an important question of Federal law which this Court should settle. That question purportedly involves the claim of a need for proper balance between federal

maritime law and policy on the one hand and federal labor law and policy on the other hand. (Petition, pg. 12.) Petitioner relies for this contention on *Southern Steamship Co.* v. *NLRB,* 316 U.S. 31 (1942); *Reese* v. *U.S.,* 95 F. 2d 784 (5th Cir. 1938); *Peninsula and Occidental Steamship Co.* v. *NLRB,* 98 F. 2d 411 (5th Cir. 1938). These cases involve the obligation, under federal maritime law, of employees to obey the authority of the vessel's Captain and the consequences to vessel employees from failure to obey. For example, in *Southern Steamship Co.* v. *NLRB, et al., supra,* this Court emphasized the importance of the relationship of the Master to seamen noting that "everyone and everything depend on him; he must command and the crew must obey." The Master or Captain on the vessel operated by Global was stipulated to be a supervisor; neither the Petitioner, the National Labor Relations Board, nor this Intervenor contend to the contrary. (Petition, p. 6.)

In suggesting that the assistant marine engineers, formerly employed by Global, found to be employees within the meaning of the National Labor Relations Act were supervisors by virtue of their licenses, the Petitioner has ignored the teachings of the Board in this sensitive factual area. In *Graham Transportation Co.,* 124 NLRB 960 (1959) the Board emphasized:

> "The fact that a marine engineer possesses a Coast Guard license does not alone support a finding of supervisory status."

Accord *Great Lakes Towing Co.,* 168 NLRB 695 (1967); *Material Services Division, General Dynamics Corp.,* 144 NLRB 908 (1963).

In attempting to demonstrate that there exists an important question of Federal law, Petitioner's contention must fail since there is no conflict between the need to obey the lawful commands of the Master and the factual finding of authority to give responsible direction by the National Labor Relations Board. The Intervenor's analysis, *supra,* pp. 7, 8, demonstrates that there is substantial evidence on the record as a whole to support the findings of the Board and the Court of Appeals that the assistant marine engineers employed on Global's vessel were "employees" not "supervisors" within the meaning of the Act.

Petitioner's attempt to suggest an important question of Federal law ignores this Court's willingness to defer to the discretion of the Board in making findings on the existence and non-existence of the supervisory status of licensed marine engineers in the face of existing federal maritime law requirements. *MEBA* v. *Interlake Steamship Co., supra.*

There is simply no important question of federal law which arises by virtue of this case which the Court must consider. What exists is a factual finding of the National Labor Relations Board that the assistant marine engineers on the Global vessel, Huges Glomar Explorer, were on the evidence in the entire record demonstrated to be "employees" rather than "supervisors".

The employment relationship and authority of these individuals can differ from other employment relationships and authority involving marine engineers on other vessels. Compare *Globe Steamship Company, et al.,* 85 NLRB 475 (1949) with *Graham Transportation Corp., supra; Great Lakes Towing Co., supra; Material Services Division, General Dynamics Corp., supra; A.L. Mechling Barge Lines,* 192 NLRB 1118 (1971).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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JOEL C. GLANSTEIN